

# In Defense of Formal Rulemaking

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*For both administrative law amateurs and cognoscenti alike, when one thinks of rulemaking, informal rulemaking, with its notice-and-comment procedures, comes to mind. This association is natural; in modern administrative law, informal rulemaking is ubiquitous. This Article, however, addresses a different type of rulemaking—one that, if not forgotten altogether, is usually brushed aside quickly as an unwanted relic of the past: formal rulemaking. In marked contrast to its informal counterpart, formal rulemaking uses procedures akin to a trial, including hearing officers, pre-trial conferences, burdens of proof and persuasion, proposed findings, cross-examination, and a closed record. Although the APA provides for formal rulemaking, however, the Supreme Court largely put an end to it decades ago in United States v. Florida East Coast Railway Co. There, following the winds of scholarly opinion that had turned against formal rulemaking as unduly cumbersome, the Court held that unless an agency's organic statute uses magic words like "on the record after opportunity for an agency hearing" no formal rulemaking is required. Because so few statutes use those magic words, formal rulemaking has largely disappeared.*

*Since Florida East Coast Railway, few have risen to formal rulemaking's defense. Indeed, no scholar in over thirty years has seriously considered formal rulemaking's virtues. This Article fills the void. While formal rulemaking's robust procedural protections admittedly can be a misfit in some contexts, it may be a mistake to categorically dismiss them in all contexts, especially because formal rulemaking has the potential to facilitate better rules of greater legitimacy. In today's world where a handful of technically complex rules can impose billions of dollars of costs on the nation's economy, the time has come to ask whether formal rulemaking might yet play a limited but crucial role in the future of administrative law.*

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## I. INTRODUCTION

When agencies promulgate regulations today, they almost always do so through informal rulemaking. Speaking very generally, under informal rulemaking—also called notice-and-comment rulemaking—an agency proposes a rule; the public submits written comments; and then the agency decides

whether to promulgate a final rule, and if so, in what form.<sup>1</sup> The final rule need not be the same as the proposed rule and often is not. Informal rulemaking is particularly important in today's world because presidents increasingly turn to agencies instead of a "hostile" Congress for political victories.<sup>2</sup> Because of that dynamic and others, informal rulemaking is at the heart of the modern regulatory state.

Unfortunately, however, informal rulemaking, while useful and necessary, is far from perfect. Although the public receives some procedural protections during this informal process, those protections are limited. Citizens cannot know whether the agency will pay close attention to the written comments they file, nor whether the rationale given by the agency reflects the real reasons for the agency's decision.<sup>3</sup> With informal rulemaking, moreover, agencies can disguise policy determination as "technical" judgments.<sup>4</sup> Informal rulemaking, in other words, is often a black box. Because informal rulemaking is imperfect, Congress has repeatedly pushed procedural reform, presidents of both parties have increased procedural requirements, and courts have done the same.<sup>5</sup> All three branches of government have expressed concern that informal rulemaking sometimes does not provide the procedural protections that best serve the public.

Informal rulemaking naturally has attracted a great deal of scholarly debate. What has been lost in the discussion, however, is that informal rulemaking is not the only way that rules can be promulgated. The Administrative Procedure Act (APA) also creates formal rulemaking.<sup>6</sup> Unlike its informal counterpart, formal rulemaking requires formal procedures, including hearing officers, pre-trial conferences, burdens, proposed findings, and cross-examination, plus there is a bar on the agency's ability to engage in *ex parte* communications.<sup>7</sup> In other words, while informal rulemaking can be a black box, formal rulemaking employs remarkably robust procedural protections.

Although the APA provides for formal rulemaking, the Supreme Court largely put an end to it forty years ago in *United States v. Florida East Coast Railway Co.*<sup>8</sup> Prior to 1973, many important statutes were understood to require formal rulemaking, including the Federal Food, Drug, and Cosmetic Act.<sup>9</sup> But formal rulemaking was controversial. While it offered robust procedural protections, many scholars believed those protections were *too* robust—that

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<sup>1</sup> 5 U.S.C. § 553(c) (2012).

<sup>2</sup> Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248 (2001).

<sup>3</sup> See, e.g., Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 514–15 (2002).

<sup>4</sup> See, e.g., Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1617 (1995).

<sup>5</sup> See *infra* Part II.

<sup>6</sup> 5 U.S.C. §§ 556–557 (2012).

<sup>7</sup> *Id.*

<sup>8</sup> *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 237–38 (1973).

<sup>9</sup> Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301–399 (2012).

they could be used to unduly frustrate regulatory change. Against that backdrop came *Florida East Coast Railway*. In that “revolutionary” case,<sup>10</sup> the Court held that unless a statute uses “text quite close to the magic words, ‘on the record after opportunity for an agency hearing,’” an agency can opt to use the more truncated informal rulemaking instead.<sup>11</sup> Since so few statutes use those magic words, formal rulemaking has been effectively exiled from administrative law.

In the years following *Florida East Coast Railway*, formal rulemaking has been largely forgotten. And when it has been remembered, the general attitude towards it has been dismissive. Indeed, while *Florida East Coast Railway* has been derided for its legal craftsmanship,<sup>12</sup> few claim that its day-to-day outcome is regrettable. As Henry Friendly put it, just because *Florida East Coast Railway* was poorly reasoned, “[i]t does not follow” that it “was bad policy.”<sup>13</sup> The academy has largely taken that position to heart. The American Bar Association’s Section on Administrative Law and Regulatory Practice, for instance, has recently declared that it has “not identified a single scholarly article written in the past thirty years that expresses regret about the retreat from formal rulemaking.”<sup>14</sup> The upshot is that the 1970s consensus that formal rulemaking is more trouble than it is worth has largely gone unquestioned for over a generation.

The time has come for the scholarly discussion to be reopened. To be sure, formal rulemaking has weaknesses; requiring greater formality could make rulemaking take longer and may not improve every rule to which it is applied. Such criticism, however, looks only at the costs of formal procedures, but not at their benefits. Formal rulemaking has downsides, but it has important upsides too, including the potential to improve some rules and bolster the legitimacy of the regulatory process.

Drawing from deep wells of past administrative law scholarship, this Article contends that writing formal rulemaking off altogether goes too far. At a minimum, formal rulemaking merits experimentation, not hand-waving about the “bad old days” before *Florida East Coast Railway*. For one thing, it is far from clear that formal rulemaking was a complete disaster even when *Florida East Coast Railway* was decided. Regulatory giants from that era like William Douglas, Henry Friendly, Harold Leventhal, and David Bazelon believed that

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<sup>10</sup> Henry J. Friendly, “Some Kind of Hearing,” 123 U. PA. L. REV. 1267, 1309 (1975) [hereinafter Friendly I].

<sup>11</sup> Michael P. Healy, *Florida East Coast Railway and the Structure of Administrative Law*, 58 ADMIN L. REV. 1039, 1039 (2006).

<sup>12</sup> See, e.g., Henry J. Friendly, Book Review, 51 N.Y.U. L. REV. 896, 901 (1976) [hereinafter Friendly II].

<sup>13</sup> *Id.*

<sup>14</sup> AM. BAR ASS’N, SECTION OF ADMIN. LAW & REGULATORY PRACTICE, COMMENTS ON H.R. 3010, THE REGULATORY ACCOUNTABILITY ACT OF 2011, at 21 (Oct. 24, 2011) [hereinafter ABA SECTION COMMENTS], available at [http://www.americanbar.org/content/dam/aba/administrative/administrative\\_law/comments3010\\_final\\_nocover.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/administrative_law/comments3010_final_nocover.authcheckdam.pdf).

formal procedures like cross-examination, if used wisely, could be useful.<sup>15</sup> But more important, even if formal rulemaking did not work then, that does not mean it would not work now. Much has changed over the last forty years that may make formal rulemaking, used prudently, even more appropriate today. If applied in appropriate circumstances, formal rulemaking—with its emphasis on accuracy and transparency—could improve the administrative process. In fact, although formal rulemaking is rare because so few statutes use the magic words, there are recent examples where formal rulemaking has worked well.

Looking beyond administrative law, moreover, the broad dismissal of formal rulemaking reveals a tension within the academy as a whole. At the same time that administrative law professors disparage trial-like procedures in the agency context, many modern civil procedure scholars lament that civil cases are often resolved on the papers.<sup>16</sup> While there are obvious and important differences between courts and agencies, it is passing strange that formal procedures can be valuable when a court crafts a new rule of strict liability or decides whether a chemical is safe, but that such procedures are rejected as *utterly* pointless when an agency confronts those precise issues. To be sure, many believe there is too much formalism in today's litigation, hence the trend towards less formal (and less costly) arbitration. But even arbitration often uses procedures more akin to those in formal rulemaking than informal rulemaking—there is, after all, often at least an opportunity to have a hearing with live witnesses.<sup>17</sup>

And the time to rethink formal rulemaking's categorical rejection may be now. It is no secret that certain technically complex regulations impose enormous costs. In particular, a handful of rules—that narrow category of “major” or “economically significant” rules that impose more than \$100 million in economic effects<sup>18</sup>—create the lion's share of today's regulatory burdens.<sup>19</sup> According to a table prepared by the White House, for instance, in 2012 alone, executive agencies promulgated thirteen major rules, with an aggregate cost of approximately \$20 billion.<sup>20</sup> By the White House's numbers, that is greater than the total costs of all major rules promulgated during the eight years comprising the first terms of Presidents George W. Bush and Bill Clinton, using constant

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<sup>15</sup> See *infra* Part II.C.

<sup>16</sup> See, e.g., Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 358–59 (2013).

<sup>17</sup> See, e.g., Ariana R. Levinson, *What the Awards Tell Us About Labor Arbitration of Employment-Discrimination Claims*, 46 U. MICH. J.L. REFORM 789, 803–04 (2013).

<sup>18</sup> See 5 U.S.C. § 804(2) (2012); Exec. Order No. 12,866, 3 C.F.R. 638, 641, 645 (1994), *reprinted in* 5 U.S.C. § 601 (2006).

<sup>19</sup> See, e.g., OFFICE OF MGMT. & BUDGET, 2013 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 96–98 (2013) [hereinafter WHITE HOUSE 2013 REPORT], *available at* [http://www.whitehouse.gov/sites/default/files/omb/inforeg/2013\\_cb/draft\\_2013\\_cost\\_benefit\\_report.pdf](http://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/draft_2013_cost_benefit_report.pdf).

<sup>20</sup> *Id.* at 100–03.

dollars.<sup>21</sup> Undoubtedly, many rules make sense. But when a single rule can cost more than a billion dollars, it is prudent to consider whether procedural reform might sometimes help the administrative process reach better outcomes.

This Article thus offers a limited defense of formal rulemaking. Although formal rulemaking has undeniable problems, there may be times when its benefits outweigh its costs. A defense of formal rulemaking, importantly, need not cut in favor of more or less regulation, just as a call for procedural reform of civil procedure need not cut in favor of more or less litigation. This Article thus takes no position on whether there is too much regulation, but rather suggests that the quality and perceived legitimacy of a limited category of rules can be improved through greater use of formal rulemaking. This Article also is not a call for a return to the days before *Florida East Coast Railway*. While that case was wrongly decided, the world has moved on, and the situation today calls for its own analysis. Nor does this Article endorse any legislation. What it does do, however, is present a conceptual defense of formal rulemaking in hopes of reopening the scholarly discussion and urging experimentation. Just when formal rulemaking should be required in the twenty-first century is a difficult question—but it *is* a question, and one that must be answered with careful, open-minded analysis.

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This Article proceeds as follows. In Part II, it discusses the origins of formal rulemaking, the way that this form of rulemaking was used prior to *Florida East Coast Railway*, how the law has changed since that case, and the modern academy's view. In Part III, the Article comes to formal rulemaking's defense, explaining why common arguments against it fall short and why informal rulemaking and so-called "hybrid" rulemaking often do not offer sufficient procedural protection. Part IV then illustrates why formal rulemaking, in limited circumstances, should be reconsidered.

## II. FORMAL RULEMAKING'S LIFE, DEATH, AND POSSIBLE REBIRTH

To appreciate formal rulemaking, it is helpful to understand why this sort of procedure was developed in the first place, how it works, and the impact *Florida East Coast Railway* had on it. Reviewing the history, it is plain that those who framed the APA envisioned a real role for formal rulemaking and that *Florida East Coast Railway* was wrongly decided. Understanding why formal rulemaking was created is a useful reminder of why the procedure can be valuable today.

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<sup>21</sup> *Id.* The Table lists only first-term statistics. All comparisons use 2001 dollars. *See id.*

### A. *The Life of Formal Rulemaking*

It's hard to imagine a world without the APA. This act "has been called a quasi-constitutional statute, with good reason. If there were no APA, the courts . . . would certainly have invented something like it in order to implement the constitutional safeguards of the Fifth Amendment's due process clause."<sup>22</sup>

In crafting the APA, its framers made a choice—there should be two, and only two, types of rulemaking. Accordingly, as Robert Hamilton explained in his seminal article addressing formal rulemaking, the APA "is polar with respect to rulemaking procedures: it does not recognize any alternative or intermediate types of procedures between informal rulemaking on the one hand and formal rulemaking on the other (except for the discretionary use of an oral hearing in connection with informal rulemaking)."<sup>23</sup> The line between the two is sharp, and "may be analogized in a crude way to the distinction between a hearing before a legislative body and a hearing before a court."<sup>24</sup> Specifically, for informal rulemaking, the agency can make a rule based on notice-and-comment procedures (i.e., based on written submissions),<sup>25</sup> while formal rulemaking requires an actual trial, complete with pre-trial proceedings, oral presentation of evidence before a hearing officer who cannot engage in ex parte communications, burdens of proof and persuasion, cross-examination, proposed findings of fact and conclusions of law, and a written decision based on the hearing.<sup>26</sup>

The decision to split rulemaking thusly, like many other aspects of the APA, "was a hard-fought compromise."<sup>27</sup> As George Shepherd has documented, the fight was between "supporters of the New Deal [who] favored a form of government in which expert bureaucrats would influence even the details of the economy, with little recourse for the people and businesses that felt the impacts of the bureaucrats' commands," and others who felt that this overflowing regulatory discretion was nothing short of "dictatorial central planning."<sup>28</sup> This collision produced the APA, which split the difference, allowing "extensive government" but limiting agency discretion.<sup>29</sup> Indeed, soon after the APA's passage, the Chair of the Senate Judiciary Committee

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<sup>22</sup> PETER H. SCHUCK, FOUNDATIONS OF ADMINISTRATIVE LAW 49 (1994).

<sup>23</sup> Robert W. Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276, 1277 (1972) [hereinafter Hamilton I].

<sup>24</sup> *Id.*

<sup>25</sup> 5 U.S.C. § 553 (2012).

<sup>26</sup> *Id.* §§ 556–557.

<sup>27</sup> George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1560 (1996).

<sup>28</sup> *Id.* at 1559.

<sup>29</sup> *Id.*

proclaimed that the APA "cut down the 'cult of discretion' so far as federal law is concerned."<sup>30</sup>

One important proposal during the run-up to the APA had required formal rulemaking for *all* rules, no matter the type, with no exceptions.<sup>31</sup> Undoubtedly, some of this desire for formal processes reflected "the deep yearning of the traditional lawyer 'for the comparatively simple life of yesteryear.'"<sup>32</sup> But there also were real concerns about checks and balances and due process.<sup>33</sup> Felix Frankfurter, for instance, observed that as the administrative state took hold, the public worried whether "safeguards" could control "the danger of arbitrary conduct."<sup>34</sup> Formal rulemaking, with public hearings and a closed record, was just such a safeguard.

The view that formal rulemaking could help protect against agency arbitrariness, moreover, had a deep pedigree. The Interstate Commerce Act of 1887—"[t]he first great federal regulatory statute"—was amended in 1906 to require a "full hearing" for Commission ratemaking.<sup>35</sup> The Supreme Court interpreted "full hearing" to require that "'parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal.'"<sup>36</sup> The Commission claimed that because it was "given legislative power," its "findings must be presumed to have been supported," even if "not formally proved at the hearing."<sup>37</sup> The Supreme Court unanimously rejected that view—"such a construction would nullify the right to a hearing,—for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute."<sup>38</sup>

Preceding the APA's enactment, moreover, the Supreme Court decided two cases addressing when oral hearings are constitutionally required. In one, *Londoner v. City & County of Denver*, the Court held that due process mandates an oral hearing where government action seriously impacts a narrow group.<sup>39</sup> But in the other, *Bi-Metallic Investment Co. v. State Board of Equalization*, the Court held that such a hearing was not necessary for government action that

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<sup>30</sup> *Id.* at 1666 (quoting Pat McCarran, *Improving "Administrative Justice": Hearings and Evidence; Scope of Judicial Review*, 32 A.B.A. J. 827, 893 (1946)).

<sup>31</sup> *Id.* at 1650.

<sup>32</sup> *Id.* at 1572 (quoting Reginald Parker, *The Administrative Procedure Act: A Study in Overestimation*, 60 YALE L.J. 581, 583 (1951)).

<sup>33</sup> See Shepherd, *supra* note 27, at 1572.

<sup>34</sup> Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 618 (1927).

<sup>35</sup> Friendly I, *supra* note 10, at 1271.

<sup>36</sup> *Id.* at 1271-72 (quoting ICC v. Louisville & Nashville R.R. Co., 227 U.S. 88, 93 (1913)).

<sup>37</sup> *Louisville & Nashville R.R. Co.*, 227 U.S. at 93.

<sup>38</sup> *Id.*

<sup>39</sup> *Londoner v. City & Cnty. of Denver*, 210 U.S. 373, 373 (1908).



impacted the whole of the City of Denver.<sup>40</sup> The Court explained that where “[a] relatively small number of persons [is] concerned, who [are] exceptionally affected, in each case upon individual grounds,” there is a due process “right to a hearing,” but for actions affecting the general society, no such hearing is required.<sup>41</sup> These cases are often understood to mean that agency adjudications require more procedures than agency rulemakings,<sup>42</sup> but some rulemakings address only a handful of entities and thus may arguably also constitutionally require an oral hearing.<sup>43</sup>

Against this backdrop, the push for formal procedures in the APA was natural. On the other hand, requiring a formal hearing for every rule would slow the administrative process. Hence, informal rulemaking—which “required neither a formal hearing nor even an opportunity to present oral argument”—was developed, which may be “the APA’s most important advance.”<sup>44</sup> Under this truncated form of rulemaking, a rule could be promulgated through “notice and comment” procedures, based on written submissions.<sup>45</sup> There would be no trial or cross-examination, and the agency could generally engage in *ex parte* communications.<sup>46</sup> Although the APA’s framers surely never anticipated rules with more than a million pages of comments,<sup>47</sup> the idea that written comments would do the trick for most rules was a wise innovation.

The two camps eventually reached agreement. Under the APA, an agency is only required to use formal rulemaking where another statute, such as the agency’s organic statute, requires a hearing.<sup>48</sup> In other words, the default is that informal rulemaking is adequate. If formal rulemaking is required, however, there must be a trial.<sup>49</sup> It is only where a party would “not be prejudiced thereby” that an agency can “adopt procedures for the submission of all or part

<sup>40</sup> *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 441 (1915).

<sup>41</sup> *Id.* at 445–46.

<sup>42</sup> See, e.g., Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1212–13 (2013) (noting the common *Londoner/Bi-Metallic* shorthand).

<sup>43</sup> See Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 865 n.61 (2007).

<sup>44</sup> Shepherd, *supra* note 27, at 1651 (citing S. 2030, 78th Cong., 2d Sess. § 3 (1944); K.C. Davis & Walter Gellhorn, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 507, 515 (1986)).

<sup>45</sup> *Id.*

<sup>46</sup> See generally *Sierra Club v. Costle*, 657 F.2d 298, 401–02 (D.C. Cir. 1981) (noting that *ex parte* communications are often permissible); Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1733–34 (2012) (citation omitted) (same point).

<sup>47</sup> *Formal Rulemaking and Judicial Review: Protecting Jobs and the Economy with Greater Regulatory Transparency and Accountability: Hearing Before the Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 33 (2011) [hereinafter *Warren Testimony*] (statement of Edward W. Warren); see also Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 954 (2006).

<sup>48</sup> Shepherd, *supra* note 27, at 1650; see also 5 U.S.C. § 553(c) (2012).

<sup>49</sup> See 5 U.S.C. § 556(d).

of the evidence in written form.”<sup>50</sup> Likewise, under formal rulemaking, the rule’s proponent has the burden of proof and the agency must prepare a written report based solely on the record coming from the hearing<sup>51</sup> and cannot engage in *ex parte* communications.<sup>52</sup> The parties are similarly entitled to submit proposed findings of fact and conclusions of law, which the agency must rule on.<sup>53</sup> And finally, a decision reached through formal rulemaking can be set aside if it is unsupported by substantial evidence *or* is arbitrary and capricious; an informal rulemaking is not subject to substantial-evidence review.<sup>54</sup>

Formal rulemaking was never required of all agencies. As Professor Hamilton explained, although most statutes did not require formal rulemaking, some significant ones did.<sup>55</sup> For example, certain acts administered by the Department of Agriculture—including the Agricultural Marketing Agreement Act<sup>56</sup> (AMAA)—require formal rulemaking, as do parts of the Federal Food, Drug, and Cosmetic Act.<sup>57</sup> At the same time, many laws require no hearing at all. And finally, many statutes do not require a hearing “on the record” but do “grant rulemaking authority subject to a generalized requirement that the agency first hold a ‘hearing’ or a ‘full hearing’ or that the agency act only ‘after opportunity for hearing.’”<sup>58</sup>

For many years, formal devices “dominated the administrative law landscape.”<sup>59</sup> Although cases striking down rules on formal rulemaking grounds were rare, they were not unheard of. For instance, in one particularly noteworthy example, Judge Harold Leventhal, writing for the D.C. Circuit, concluded that the Department of Agriculture erred by not allowing tomato importers to orally challenge a marketing order promulgated with input from local producers.<sup>60</sup> His reasoning went to the heart of formal rulemaking’s power—the notion that a transparent process with adversarial procedures can

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<sup>50</sup> *Id.*

<sup>51</sup> 5 U.S.C. §§ 556(e), 557(b)–(c).

<sup>52</sup> *Id.* § 557(d)(1). It should be noted that the APA was amended in 1976 to reinforce limits on *ex parte* contacts in formal proceedings. *See, e.g., Note, Due Process and Ex Parte Contacts in Informal Rulemaking*, 89 YALE L.J. 194, 197 (1979).

<sup>53</sup> 5 U.S.C. § 557(c).

<sup>54</sup> *Id.* § 706(2). Whether there is “practical difference between substantial evidence review and arbitrary and capricious review” is questionable. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 520 (D.C. Cir. 1983) (internal quotations omitted).

<sup>55</sup> Hamilton I, *supra* note 23, at 1278.

<sup>56</sup> *See* Agricultural Marketing Agreement Act, 7 U.S.C. §§ 671–674 (2012).

<sup>57</sup> Congress eliminated formal rulemaking for most foods in 1990. It chose to retain formal rulemaking, however, for dairy products and maple syrup, as well as a few other products. *See* Lisa Heinzerling, *Undue Process at the FDA: Antibiotics, Animal Feed, and Agency Intransigence*, 37 VT. L. REV. 1007, 1021 (2013).

<sup>58</sup> Hamilton I, *supra* note 23, at 1281.

<sup>59</sup> ADMIN. CONFERENCE OF THE U.S., A GUIDE TO FEDERAL AGENCY RULEMAKING, at ix (2d ed. 1991).

<sup>60</sup> *Walter Holm & Co. v. Hardin*, 449 F.2d 1009, 1016 (D.C. Cir. 1971).

produce better, more legitimate rules.<sup>61</sup> In particular, Leventhal reasoned that a rulemaking “not requiring an opportunity for oral presentation to the Department on crucial matters, and not requiring evidence in the record, is a seed bed for the weed of industry domination.”<sup>62</sup> In a formal rulemaking, by contrast, Leventhal explained that “the Secretary comes himself to make a determination of crucial facts and conclusions,” and “must think in terms of support in evidence and general standards, and cannot be guided solely by deference to industry desires.”<sup>63</sup> Accordingly, the D.C. Circuit held that “fairness may require an opportunity for cross-examination on the crucial issues.”<sup>64</sup>

### B. *The Death of Formal Rulemaking*

The Supreme Court largely put an end to formal rulemaking in 1973’s *Florida East Coast Railway*—a case which has won little praise for its reasoning but whose policy outcome has been celebrated. *Florida East Coast Railway* was undoubtedly influenced by the winds of scholarly opinion that had turned against formal rulemaking by the early 1970s.<sup>65</sup> In particular, one example of a rulemaking gone awry involving peanut butter has been a talking point for decades. Similarly, the Administrative Conference of the United States expressed dissatisfaction with formal rulemaking leading up to the Court’s decision.

#### 1. *The “Infamous” Peanut Butter Episode*

Time and again, whenever one thinks of formal rulemaking, if one does at all, the literature points to the “infamous . . . Peanut Butter case, where the main issue was whether peanut butter should be 90 percent or 87 percent peanuts,” but which took the FDA more than a decade to complete.<sup>66</sup> Based on that “notorious”<sup>67</sup> example, commentators even today argue that formal rulemaking enables regulated parties to so gum up the works that nothing gets done.<sup>68</sup> So

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See, e.g., 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.2 (5th ed. 2010).

<sup>66</sup> ELIZABETH C. RICHARDSON, ADMINISTRATIVE LAW & PROCEDURE 170 (1996).

<sup>67</sup> Edward Rubin, *It’s Time To Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 107 (2003).

<sup>68</sup> See, e.g., William H. Allen, Book Review, 80 COLUM. L. REV. 1149, 1158 (1980) (bemusedly noting how often the peanut butter example is used); William D. Dixon, *Rulemaking and the Myth of Cross-examination*, 34 ADMIN L. REV. 389, 404, 419 (1982) (explaining it “is doubtful whether any rulemaking proceeding has had such a profound effect” on “administrative procedure” as the infamous “peanut butter rule”); Robert W. Hamilton, *Rulemaking on a Record by the Food and Drug Administration*, 50 TEX. L. REV.

much lore has grown up around this particular example of rulemaking, however, that the true story has been lost.

Relying on a partial reading of Professor Hamilton's research, the popular retelling is that the FDA "managed to spend more than ten years (and to compile a hearing transcript of nearly 8000 pages) settling the not-so-pressing question of the minimum peanut content of 'peanut butter.' The peanut butter rulemaking commenced in 1959, and did not conclude until 1970, when the Third Circuit affirmed the rule."<sup>69</sup> Formal rulemaking's critics contend the process should have moved more quickly because the issue was so simple: "Would it 'promote honesty and fair dealing in the interest of consumers' to require peanut butter to contain at least 90 percent peanuts (as proposed by the FDA) or 87 percent peanuts (as proposed by the industry)?"<sup>70</sup> Things took so long, the legend goes, because industry slowed things down: "Illustrative is the testimony and cross-examination of the first Government witness. He presented a survey of cook books, patent applications, and the like dealing with the historical composition of peanut butter."<sup>71</sup> Surveying the scene, Hamilton wryly noted that a cynic might think that "the peanut butter industry did not desire the standard to go into effect."<sup>72</sup>

There is more to the story, however, than the popular retelling. For one thing, a full reading of Hamilton's research shows that the FDA could have prevented duplicative testimony, but failed to do so.<sup>73</sup> Indeed, the Administrative Conference of the United States chided the FDA for not implementing "procedures followed by many other agencies to facilitate large multiparty proceedings."<sup>74</sup> The Conference noted, for instance, that a "hearing examiner should describe in writing the areas of disagreement, and in the absence of surprise, cross-examination at the hearing should be limited to the areas of disagreement, as defined at the prehearing conference."<sup>75</sup> Similarly, the "examiner should exercise substantial authority over cross-examination in order to eliminate irrelevant or cumulative testimony and to expedite the hearing."<sup>76</sup>

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1132, 1142 (1972) [hereinafter Hamilton II] (noting "wide criticism" of peanut butter rulemaking); Adam M. Samaha, *Undue Process*, 59 STAN. L. REV. 601, 667, 670 (2006) (describing the peanut butter "fiasco" as a "nightmare"); Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990*, 80 GEO. WASH. L. REV. 1414, 1472 (2012) (discussing the "infamous peanut butter rulemaking").

<sup>69</sup> Webb Yackee & Webb Yackee, *supra* note 68, at 1472 (footnote omitted).

<sup>70</sup> Hamilton II, *supra* note 68, at 1144.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 1145.

<sup>73</sup> Hamilton I, *supra* note 23, at 1289 (explaining that some of "FDA's problems [were] of its own making").

<sup>74</sup> ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 71-7, RULEMAKING ON A RECORD BY THE FOOD AND DRUG ADMINISTRATION 1 (1971) [hereinafter ACUS 71-7], available at <http://www.acus.gov/recommendation/71-7>.

<sup>75</sup> *Id.* at 3.

<sup>76</sup> *Id.* at 4.

The Conference also urged that hearings not be held “when the only issues in dispute involve purely legal disputes or will not affect the ultimate outcome of the proceeding.”<sup>77</sup> Because the FDA had such poor procedures in place for the peanut butter rulemaking, it is peculiar to use this particular rule to indict formal rulemaking writ large.<sup>78</sup> Even with those poor procedures, moreover, the FDA’s hearing process was not *that* long; it only took about thirty hearing days.<sup>79</sup> Thirty days is a far cry from eleven years.

Likewise, leaving aside the FDA’s failure to streamline the hearing, “a good portion of the delay” should be attributed “to the fact that FDA regulators viewed the peanut butter proposal as relatively unimportant, and failed to prioritize the rulemaking.”<sup>80</sup> Indeed, over six years were lost before the FDA even began the much-lampooned public hearings.<sup>81</sup> And after the hearings were over, the FDA spent over eighteen months preparing tentative findings of fact and conclusions of law,<sup>82</sup> underscoring the fact that agencies “may be responsible, sometimes even consciously, for extreme delays in rulemaking.”<sup>83</sup> Judicial review also took about two years, resulting in a six-page decision; there is no reason to think review of an informal rulemaking would have been quicker.<sup>84</sup>

All of this is to say that blaming formal rulemaking for the peanut butter rule is unfair. The truth is that the trial itself, while not short, took only thirty days of actual hearings, and a transcript of nearly 8000 pages, while long, is par for the course in judicial cases.<sup>85</sup> Nevertheless, even today, the peanut butter rule is used as a rejoinder to formal rulemaking.<sup>86</sup> Granted, there undoubtedly are legitimate examples where formal rulemaking was genuinely cumbersome (so debunking this example hardly proves that formal rulemaking is a good

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<sup>77</sup> *Id.* at 6.

<sup>78</sup> See Dixon, *supra* note 68, at 419–20 (lambasting the careless way the rulemaking has been distorted by those “intent on using this ill-fated proceeding to demonstrate that trial-type procedures and rulemaking are incompatible”).

<sup>79</sup> See William R. Pendergast, *Have the FDA Hearing Regulations Failed Us?*, 23 FOOD DRUG COSM. L.J. 524, 527 (1968); see also Dixon, *supra* note 68, at 420.

<sup>80</sup> Webb Yackee & Webb Yackee, *supra* note 68, at 1472 n.283 (citing Hamilton II, *supra* note 68, at 1143–44).

<sup>81</sup> Hamilton II, *supra* note 68, at 1143.

<sup>82</sup> *Id.* at 1145.

<sup>83</sup> Webb Yackee & Webb Yackee, *supra* note 68, at 1472 n.283; see also Dixon, *supra* note 68, at 420 (explaining that “the internal workings of [the] FDA [are] to blame and not its use of trial-type procedures”).

<sup>84</sup> See *Corn Prods. Co. v. FDA*, 427 F.2d 511 (3d Cir. 1970).

<sup>85</sup> See, e.g., *United States v. Grober*, 624 F.3d 592, 602 (3d Cir. 2010).

<sup>86</sup> See, e.g., *APA at 65: Is Reform Needed To Create Jobs, Promote Economic Growth, and Reduce Costs?: Hearing Before the Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 50 (2011) [hereinafter Strauss Testimony] (testimony of Peter Strauss).

idea),<sup>87</sup> but the image of peanut butter has long had an unwarranted influence on administrative law.

## 2. *The United States Administrative Conference*

The United States Administrative Conference in the early 1970s also largely turned against formal rulemaking. The Conference began operations in 1968.<sup>88</sup> Following the “FDA’s peanut butter rule debacle”<sup>89</sup> and the like, one of the Conference’s early projects was to review formal rulemaking.

In late 1971, the Conference critiqued formal rulemaking in the context of the FDA. Relying on a report authored by Professor Hamilton,<sup>90</sup> the Conference submitted that “‘rulemaking on a record,’ has worked poorly. The basic problem is that the statutory provisions require procedures which are ill-adapted to the promulgation of general rules of broad applicability.”<sup>91</sup> Requiring formal rulemaking thus was “probably unwise” and the FDA was urged to minimize its costs.<sup>92</sup> As explained above, the Conference pushed the FDA to use better internal procedures.

Of particular relevance, the Conference in 1972—then newly headed by Antonin Scalia—stressed that it “‘emphatically believes that trial-type procedures should never be required for rulemaking except to resolve issues of specific fact,” and urged that “Congress should never require trial-type procedures for resolving questions of policy or of broad or general fact.”<sup>93</sup> Although acknowledging that formal rulemaking can be valuable—if there is a “special reason” for it—the Conference recommended that whether to use formal procedures should be within an agency’s discretion.<sup>94</sup> In 1976, the Conference further explained that formal procedures may be appropriate where,

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<sup>87</sup> For instance, Professor Pierce’s treatise lists several other examples where formal rulemaking hindered the regulatory process—sometimes stopping it altogether. *See* PIERCE, *supra* note 65, § 7.2. Other examples could also be identified, especially if one includes certain types of formal “hybrid rulemaking” such as the Magnuson–Moss Warranty Act which applies to the Federal Trade Commission and requires cross-examination. *See infra* Part III.A.1.c.3. This Article does not dispute that such examples exist. On the other hand, it is important to look at both the bad and good. It must not be forgotten that there are examples where formal rulemaking has worked well. *See infra* Part III.

<sup>88</sup> *History*, ADMIN. CONF. UNITED STATES, <http://acus.gov/history> (last visited Jan. 20, 2014).

<sup>89</sup> Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469, 504 (1986).

<sup>90</sup> *See* Hamilton II, *supra* note 68, at 1132.

<sup>91</sup> ACUS 71-7, *supra* note 74, at 1.

<sup>92</sup> *Id.*

<sup>93</sup> ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 72-5, PROCEDURES FOR THE ADOPTION OF RULES OF GENERAL APPLICABILITY 1-2 (1972), available at <http://www.acus.gov/recommendation/72-5>.

<sup>94</sup> *Id.*

for example, the issue is scientifically “complex” or the costs are “significant.”<sup>95</sup>

### 3. Florida East Coast Railway

Influenced by this academic assault<sup>96</sup> and perhaps Justice Rehnquist’s recent experience in the Executive Branch,<sup>97</sup> the Supreme Court decided *Florida East Coast Railway* in 1973.<sup>98</sup> This decision—which profoundly undercut formal rulemaking—is widely and properly regarded as one of the most important cases in all of administrative law.<sup>99</sup>

As Judge Friendly explained, the case’s facts are simple enough: “In 1917 Congress amended the Interstate Commerce Act to endow the ICC with power ‘after hearing’ to establish reasonable ‘rules, regulations and practices’ with respect to freight car service, including the compensation to be paid by one railroad for using the cars of another.”<sup>100</sup> To establish compensation for use of another railroad’s car, for decades the agency had used full hearings.<sup>101</sup> In 1966, moreover, the statute was amended, and all understood that formal hearings would still be required.<sup>102</sup> Nevertheless,

the Commission took a shortcut, according the right to file written statements of fact and position concerning a proposed schedule of charges but denying an oral hearing in the absence of a request showing “with specificity the need therefor and the evidence to be adduced.” The Commission denied all such requests.<sup>103</sup>

Upset, two carriers challenged the agency’s decision. The lower court agreed with the carriers, but the Supreme Court reversed in a decision written by Justice Rehnquist.

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<sup>95</sup> ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 76-3, PROCEDURES IN ADDITION TO NOTICE AND THE OPPORTUNITY FOR COMMENT IN INFORMAL RULEMAKING 3 (1976) [hereinafter ACUS 76-3], available at <http://www.acus.gov/sites/default/files/documents/76-3.pdf>.

<sup>96</sup> See, e.g., Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1068 (1998) (explaining how background understandings influenced the Court’s decision in *Florida East Coast Railway*).

<sup>97</sup> See David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 294 n.3 (1976) (describing Justice Rehnquist’s voting patterns in controversies between branches of government or between individuals and the government).

<sup>98</sup> *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224 (1973).

<sup>99</sup> See generally PIERCE, *supra* note 65, § 7.2; Friendly I, *supra* note 10, at 1307–08.

<sup>100</sup> Friendly I, *supra* note 10, at 1305.

<sup>101</sup> *Id.* (citing *Bos. & M.R.R. v. United States*, 162 F. Supp. 289 (D. Mass.), *appeal dismissed*, 358 U.S. 68 (1958)).

<sup>102</sup> *Id.* (citations omitted).

<sup>103</sup> *Id.* (quoting *Incentive Per Diem Charges*—1968, 337 I.C.C. 183, 213 (1969)).

Building upon *United States v. Allegheny-Ludlum Steel Corp.*,<sup>104</sup> the Supreme Court held that formal rulemaking was not required. Despite acknowledging *Louisville & Nashville Railroad*, the Court held that the language "after hearing" is insufficient to trigger formal rulemaking because the statute did not also say "on the record."<sup>105</sup> In doing so, the majority rejected Judge Friendly's view "that it was 'rather hard to believe that the last sentence of § 553(c) [i.e., instructing when formal rulemaking is required] was directed only to the few legislative sports where the words 'on the record' or their equivalent had found their way into the statute book.'"<sup>106</sup> Indeed, under the majority's view, "hearings" often need only be the submission of written comments, not oral events at all.<sup>107</sup>

Justice Douglas—joined by Justice Stewart—dissented, criticizing the Court's "sharp break with traditional concepts of procedural due process."<sup>108</sup> Although his dissent involved careful parsing of the Court's cases, Douglas made clear that the majority was not only wrong as a matter of precedent, but also in principle. He did "not believe it is within our traditional concepts of due process to allow an administrative agency to saddle anyone with a new rate, charge, or fee without a full hearing that includes the right to present oral testimony, cross-examine witnesses, and present oral argument."<sup>109</sup> Importantly, Douglas tied his view to the legitimacy of the administrative state. He explained that if an agency is authorized to exercise "broad discretionary power" that can have "devastating effects on a particular line," and if courts are bound to defer to such "discretionary power," it follows that there must be an "inexorable safeguard . . . of a fair and open hearing."<sup>110</sup> To be sure, Douglas did not endorse formal processes for "wholly legislative" judgments, but where a "quasi-legislative" judgment depends on a "preliminary finding," Douglas believed that formal rulemaking should be required.<sup>111</sup>

The upshot of *Florida East Coast Railway* is a "magic words" requirement<sup>112</sup>—"since *Florida East Coast Railway*, no organic rulemaking statute that does not contain the specific words 'on the record' has ever been

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<sup>104</sup> *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757–58 (1972). That case, also about freight-cars, held that formal rulemaking was not required based on the pre-1966 amendment text of the Interstate Commerce Act. *See id.* at 757.

<sup>105</sup> *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 237–38 (1973).

<sup>106</sup> *Id.* at 237 (quoting *Long Island R.R. Co. v. United States*, 318 F. Supp. 490, 496 (E.D.N.Y. 1970)).

<sup>107</sup> Friendly I, *supra* note 10, at 1307.

<sup>108</sup> *Fla. E. Coast Ry. Co.*, 410 U.S. at 246 (Douglas, J., dissenting).

<sup>109</sup> *Id.* at 247. It is possible to read Douglas's dissent as only applying to ratemaking. As discussed below, this Article argues that formal rulemaking should be applied beyond ratemaking. *See infra* Part IV.

<sup>110</sup> *Fla. E. Coast Ry. Co.*, 410 U.S. at 256 (citations omitted).

<sup>111</sup> *Id.* at 251–52. This Article believes there may be times where even "wholly legislative" judgments would benefit from cross-examination. *See infra* Part III.A.1.

<sup>112</sup> *See, e.g., Hamilton I, supra* note 23, at 1278.



held to require formal rulemaking.”<sup>113</sup> Because “so few statutes contain the phrase, agencies generally do not conduct formal rulemakings when promulgating legally binding regulations.”<sup>114</sup> The result is that “formal rulemaking under 5 U.S.C. §§ 556 and 557 has become almost extinct.”<sup>115</sup>

*Florida East Coast Railway* has won little praise for its craftsmanship.<sup>116</sup> Friendly’s criticism, for example, was sharp—and he largely was sympathetic to the case’s policy outcome.<sup>117</sup> As a matter of traditional statutory interpretation, the decision is hard to defend. After all, as Jonathan Siegel has explained, “the Commission’s own general counsel advised Congress that a hearing would be required before the Commission could issue a rule, in terms that obviously assumed that the hearing would be an oral evidentiary hearing.”<sup>118</sup> Historically, moreover, “the statutory requirement of a ‘hearing,’ in 1917, would almost surely have been understood to require an oral evidentiary hearing.”<sup>119</sup> In short, “the meaning of the term ‘hearing’ was clear, and it clearly contemplated an oral process.”<sup>120</sup> Rather than follow the statute, however, the Court gutted formal rulemaking.

### C. Formal Rulemaking’s Rebirth?

Given the foregoing, it is tempting to conclude that formal rulemaking has fallen into desuetude. There is a touch of truth to that conclusion, although formal rulemaking is not entirely extinct. Some statutes use the requisite “magic words,” including the Marine Mammal Protection Act, and there are recent examples where formal rulemaking has worked well.<sup>121</sup> Nevertheless, it is fair to say that formal rulemaking is mostly dead; it no longer is a foundational part of administrative law.

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<sup>113</sup> Beermann & Lawson, *supra* note 43, at 857 n.9; *see also* Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 757 n.127 (2011) (stating that *Florida East Coast Railway* established a presumption against formal rulemaking).

<sup>114</sup> Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 901 (2008).

<sup>115</sup> *The Supreme Court, 1999 Term—Leading Cases*, 114 HARV. L. REV. 179, 374 n.44 (2000).

<sup>116</sup> *See, e.g.*, Gary S. Lawson, *Reviving Formal Rulemaking: Openness and Accountability for Obamacare* (Heritage Found., Backgrounder No. 2585, 2011), available at [http://thf\\_media.s3.amazonaws.com/2011/pdf/bg2585.pdf](http://thf_media.s3.amazonaws.com/2011/pdf/bg2585.pdf); *cf.* Healy, *supra* note 11, at 1047 (“[The case] illustrates the . . . extent of lawmaking discretion that a court may exercise in the guise of interpretation.”).

<sup>117</sup> *See* Friendly I, *supra* note 10, at 1305–15.

<sup>118</sup> Siegel, *supra* note 96, at 1068 n.251.

<sup>119</sup> *Id.* at 1068.

<sup>120</sup> *Id.* (citing 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 6.22, at 557 (2d ed. 1978)). Siegel, it should be noted, applauds *Florida East Coast Railway* for its willingness to break away from traditional statutory interpretation. *See id.* at 1069–70.

<sup>121</sup> *See infra* Part III.B.1.

The intuition behind formal rulemaking, however—the notion that informal rulemaking's truncated procedures are sometimes not enough—has never gone away. Judges, presidents, and Congress have all recognized the intuition and acted on it. To say that formal rulemaking is mostly dead, therefore, is not to say that informal rulemaking's superiority in all instances is beyond question.

Even after *Florida East Coast Railway*, for instance, celebrated jurists expressed sympathy for trial-like procedures. Judge Friendly's comments are noteworthy because he was hostile to the idea that agencies should "work like courts" and "applauded" attempts to break away from such models.<sup>122</sup> Nevertheless, he concluded that formal procedures should not be categorically rejected. In particular, Friendly believed that "due process may [] sometimes require evidentiary hearings on some aspects of rulemaking," depending "on whether the propriety of the rule turns on a 'limited issue of specific fact' as distinguished from considerations of policy."<sup>123</sup> He thus prophesied that "we are entering an era when courts will recognize the impracticability of trial-type hearings for many instances of administrative 'adjudication,' but will insist upon such hearings for some issues in rulemaking."<sup>124</sup> Although this Article envisions a more vigorous role for formal rulemaking than did Friendly, Friendly's nuanced view that "trial-type" hearings may be warranted for some rulemakings should give pause to those on the anti-formal rulemaking bandwagon.

Judge Harold Leventhal, one of the great masters of administrative law, also expressed sympathy for cross-examination. In *International Harvester Co. v. Ruckelshaus*, for instance, a case concerning the regulation of tailpipe emissions, Leventhal concluded that because the EPA failed in an informal rulemaking to defend its predication for when new technology would be feasible, a remand was in order—with cross-examination.<sup>125</sup> The predicative model an agency uses would appear to be a "policy" question, but Leventhal concluded that cross-examination would help the agency make a better substantive decision. Although he did not advocate imprudent use of formal procedures,<sup>126</sup> Leventhal recognized how powerful they can be. Granted, the D.C. Circuit's frequent practice in the 1970s of requiring formal procedures in informal rulemakings was famously put to a halt by the Supreme Court as contrary to the text of the APA in *Vermont Yankee*.<sup>127</sup> There, the Supreme Court noted that the APA's informal rulemaking provisions do not require such heightened procedures.<sup>128</sup> But whether or not authorized by the APA, surely the

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<sup>122</sup> Friendly II, *supra* note 12, at 899.

<sup>123</sup> *Id.* at 901.

<sup>124</sup> *Id.*

<sup>125</sup> *Int'l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 649 (D.C. Cir. 1973).

<sup>126</sup> See, e.g., *Am. Airlines, Inc. v. CAB*, 359 F.2d 624, 629 (D.C. Cir. 1966) (opposing "shackl[ing]" rulemaking with "formalities developed for the adjudicatory process and basically unsuited for policy rule making").

<sup>127</sup> *Vt. Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 542–48 (1978).

<sup>128</sup> *Id.*

reason *why* Leventhal ordered the use of cross-examination was that he believed it could be effective—a point underscored by Leventhal's observation discussed above about the virtues of formal rulemaking: informal rulemaking, in his view, could sometimes be “a seed bed for the weed of industry domination.”<sup>129</sup>

Similarly, both before and after *Florida East Coast Railway*, other judicial heavyweights on the D.C. Circuit like Judges David Bazelon and Carl McGowan required cross-examination and other formal procedures, even for informal rulemaking.<sup>130</sup> Even more than Leventhal, Bazelon in particular focused on agency procedure, and strongly agreed that cross-examination was important.<sup>131</sup> Again, although these efforts to impose greater formality were stopped by the Supreme Court in *Vermont Yankee*,<sup>132</sup> the policy instinct behind them should also not be dismissed. These were smart judges who knew a lot about administrative law, and they believed that formal procedures could sometimes help agencies make better substantive decisions.

Indeed, as others have noted, the Supreme Court's decision in 1983 to bless the “hard-look” doctrine<sup>133</sup> confirms that it too has come to be wary of trusting informal rulemaking too much. In fact, under hard-look review, a regulated party can, in a way, sometimes obtain a diluted form of formal rulemaking by attacking an informal rule's “impact studies, cost-benefit analyses, and risk assessments.”<sup>134</sup> Like formal rulemaking, these devices help ensure that agencies are properly exercising their discretion by making them take more procedural steps before acting. This point, of course, should not be taken too far—there still are differences between the two types of rulemaking, including cross-examination. The fact, however, that the Supreme Court has made informal rulemaking more demanding shows its recognition that informal rulemaking sometimes is not enough. But just because the Supreme Court has increased the burden on agencies in informal rulemaking does not mean the Court has taken the *right* path. As Judge Bazelon believed, although both hard-look review and procedural formality are aimed at the same ultimate target—better policy—formal procedures may sometimes be more effective than hard-look review.<sup>135</sup>

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<sup>129</sup> *Walter Holm & Co. v. Hardin*, 449 F.2d 1009, 1016 (D.C. Cir. 1971).

<sup>130</sup> *Warren Testimony*, *supra* note 47, at 32 (citing *Auto. Parts & Accessories v. Boyd*, 407 F.2d 330 (D.C. Cir. 1968); *Greater Bos. Television v. FCC*, 444 F.2d 841 (D.C. Cir. 1970); *Home Box Office v. FCC*, 567 F.2d 9, 35–36 (D.C. Cir. 1977)).

<sup>131</sup> See Ronald J. Krotoszynski, Jr., “*History Belongs to the Winners*”: *The Bazelon–Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action*, 58 ADMIN. L. REV. 995, 1003–04 (2006).

<sup>132</sup> *Vermont Yankee*, 435 U.S. at 542–48.

<sup>133</sup> *Beermann & Lawson*, *supra* note 43, at 859 (citing *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

<sup>134</sup> Ronald M. Levin, *The Administrative Law Legacy of Kenneth Culp Davis*, 42 SAN DIEGO L. REV. 315, 326 (2005).

<sup>135</sup> See, e.g., Krotoszynski, *supra* note 131, at 998.

Equally important, beyond the judiciary, the view that additional procedures should be required for even informal rulemaking has been implemented by presidents for decades. While the precise contours of the executive orders have shifted, every president since Ronald Reagan has imposed procedural restraints on informal rulemaking.<sup>136</sup> President George W. Bush, moreover, went further and ordered that “each agency may also consider whether to utilize formal rulemaking procedures . . . for the resolution of complex determinations after comment period of not less than 60 days.”<sup>137</sup> Although President Obama revoked this order (which addressed issues beyond formal rulemaking), he did not rescind President Clinton’s Executive Order No. 12,866—an order which President Bush had left “virtually unmodified for most of his Administration,” and which imposed many more procedural duties than the APA.<sup>138</sup> The fact that presidents of both parties have increased procedural protections suggests that the public is not satisfied with informal rulemaking in its pure form.

Congress too has recognized the need for more procedure, for instance in the context of hybrid rulemaking. In hybrid rulemakings, agencies sometimes are required (in varying degrees) to use formal procedures like cross-examination.<sup>139</sup> Although “hybrid rulemaking,” like jurisdiction, is a term with too many meanings (because there is no definite list of procedures it always encompasses), it sometimes can be similar to formal rulemaking.<sup>140</sup> More than hybrid rulemaking, moreover, Congress has recently explored requiring greater use of formal rulemaking itself. Most important is the Regulatory Accountability Act (RAA).<sup>141</sup> This bipartisan bill—which would impact many aspects of administrative law beyond formal rulemaking—directs that an “agency shall provide a reasonable opportunity for cross-examination” in compliance “with sections 556 and 557” of the APA for “high-impact rules.”<sup>142</sup> High-impact rules are defined as those “likely to impose an annual cost on the economy of \$1,000,000,000 or more, adjusted annually for inflation.”<sup>143</sup> Although criticized by administrative law professors,<sup>144</sup> the House passed the RAA, with nineteen Democrats and almost all the Republicans voting in favor

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<sup>136</sup> See, e.g., Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 U. KAN. L. REV. 473, 491–92 (2003) (discussing executive orders); see also Jennifer Nou, *Agency Self-insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1769–70 (2013) (discussing later presidential orders).

<sup>137</sup> Exec. Order No. 13,422 § 5(a), 3 C.F.R. 191 (2007).

<sup>138</sup> Nou, *supra* note 136, at 1768–69.

<sup>139</sup> See, e.g., GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 362 (6th ed. 2013).

<sup>140</sup> See, e.g., Dixon, *supra* note 68, at 438 (explaining there can be different forms of hybrid rulemaking).

<sup>141</sup> H.R. 3010, 112th Cong. § 1 (2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3010rfs/pdf/BILLS-112hr3010rfs.pdf>.

<sup>142</sup> *Id.* § 3(e).

<sup>143</sup> *Id.* § 2.

<sup>144</sup> See *infra* Part II.D.

(the Senate did not act).<sup>145</sup> This Article does not offer a detailed examination of the RAA, but it is noteworthy that a bill requiring formal rulemaking commanded a large majority in a house of Congress.<sup>146</sup> The RAA was reintroduced in 2013, again with bipartisan support.<sup>147</sup>

#### *D. Today's Scholarly View of Formal Rulemaking*

Although all three branches of government have recognized that informal rulemaking's procedural protections can be inadequate, administrative law scholars still generally oppose formal rulemaking. In a letter to Congress concerning the RAA, for instance, the American Bar Association's Section of Administrative Law and Regulatory Practice (the ABA Section) reported that no scholar has said a kind word about formal rulemaking in a "scholarly" publication in over "thirty years."<sup>148</sup> From this, the ABA Section claimed there is "a virtual consensus in the administrative law community that the APA formal rulemaking procedure is obsolete."<sup>149</sup> The ABA Section conceded there are times when trial-like procedures may be useful, especially for "proceedings of unusual complexity or with a potential for significant economic impact," but argued that when to use formal rulemaking should be within an agency's discretion.<sup>150</sup> The ABA Section also opposed any effort to extend cross-examination beyond "issues of 'specific' fact,"<sup>151</sup> and pointed out, citing Professor Hamilton's research, that formal rulemaking "slowed proceedings

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<sup>145</sup> H.R. 3010 (112th): *Regulatory Accountability Act of 2011 (On Passage of the Bill)*, GOVTRACK.US, <https://www.govtrack.us/congress/votes/112-2011/h888> (last visited Mar. 1, 2014).

<sup>146</sup> *Id.*

<sup>147</sup> See Ben Goad, *Bipartisan Bill Would Overhaul Regulatory System, Target "Mega-Rules,"* HILL (May 23, 2013, 9:54 PM), <http://thehill.com/blogs/regwatch/legislation/301721-bipartisan-bill-would-overhaul-regulatory-system-target-mega-rules> (explaining that the RAA was pushed by co-authors Senators Mark Pryor and Rob Portman, with co-sponsors "Sens. Susan Collins (R-Maine), Bill Nelson (D-Fla.), Joe Manchin (D-W.V.), Angus King (I-Maine), Kelly Ayotte (R-N.H.), Mike Johanns (R-Neb.), and John Cornyn (R-Tex.)").

<sup>148</sup> ABA SECTION COMMENTS, *supra* note 14, at 21. It should be noted that Gary Lawson has defended formal rulemaking, albeit, to be fair, briefly and outside of a law review. See Lawson, *supra* note 116, at 3–4. Similarly, Wendy Wagner has tentatively endorsed procedures similar to formal rulemaking in a limited setting. See Wendy Wagner, *Using Competition-Based Regulation To Bridge the Toxics Data Gap*, 83 IND. L.J. 629, 642 (2008) (proposing "adversarial hearings in formal rulemaking fashion" to determine "competitive claims of environmental or health superiority"). Finally, Yair Listokin has observed in his call for greater experimentation that "[n]either formal rulemaking nor hybrid rulemaking appears to present overwhelming costs. While the recordkeeping requirements of formal rulemaking undoubtedly add to costs, such costs again appear small relative to the potential impacts of policy." Yair Listokin, *Learning Through Policy Variation*, 118 YALE L.J. 480, 533 (2008).

<sup>149</sup> ABA SECTION COMMENTS, *supra* note 14, at 20.

<sup>150</sup> *Id.* at 21 (quoting 106 ABA ANN. REP. ¶ 5(b)(ii) (1981)).

<sup>151</sup> *Id.* at 22.

considerably and undermined agencies' ability to fulfill their mandates expeditiously."<sup>152</sup>

In addition, a group of forty-two professors wrote separately to the House Judiciary Committee to stress "the consensus of the administrative law community that the APA formal rulemaking procedure is unworkable and obsolete."<sup>153</sup> According to these scholars, greater formality would "invit[e] obstructionist tactics that agencies would be unable to defend against."<sup>154</sup> This letter urged that rulemaking is already "ossified" by "procedural and analytical requirements added by Congress, presidents, and the courts over the past few decades," even without formal rulemaking.<sup>155</sup> The upshot, the letter argued, is that agencies "substitute other less participatory procedures, such as adjudication, guidance instruments or interim-final rules, for ordinary rulemaking."<sup>156</sup>

Congress also has held hearings. For instance, the House Judiciary Committee in 2011 held a hearing devoted to whether formal rulemaking is conceptually sound. The panel featured two practitioners of administrative law (Edward Warren and Noel Francisco) who advocated for greater use of formal rulemaking, and one professor (Matthew Stephenson) who opposed it. The practitioners explained that "formal rulemaking is more rigorous and transparent than informal rulemaking"<sup>157</sup> while facilitating improved judicial review.<sup>158</sup> Stephenson, however, countered that opposition to formal rulemaking "command[s] wide consensus among administrative law scholars across the political spectrum" and he "strongly" believes the consensus is correct.<sup>159</sup>

<sup>152</sup> *Id.* (citing Hamilton I, *supra* note 23, at 1312–13).

<sup>153</sup> Letter of Forty-Two Admin. Law Professors to Lamar Smith, Chairman, Comm. on the Judiciary, and John Conyers, Jr., Ranking Member, Comm. on the Judiciary (Oct. 24, 2011), available at <http://democrats.judiciary.house.gov/sites/democrats.judiciary.house.gov/files/LawReg111024.pdf>.

<sup>154</sup> *Id.* at 1.

<sup>155</sup> *Id.* at 2.

<sup>156</sup> *Id.*

<sup>157</sup> *Formal Rulemaking and Judicial Review: Protecting Jobs and the Economy with Greater Regulatory Transparency and Accountability: Hearing Before the Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 177 (2011) (statement of Noel Francisco).

<sup>158</sup> Warren Testimony, *supra* note 47, at 34.

<sup>159</sup> *Formal Rulemaking and Judicial Review: Protecting Jobs and the Economy with Greater Regulatory Transparency and Accountability: Hearing Before the Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 204 (2011) [hereinafter Stephenson Testimony] (statement of Matthew C. Stephenson). Additional hearings touching upon formal rulemaking have also been held. In one, Jeffrey Rosen—former general counsel of OMB and the Department of Transportation and currently chair of the ABA's Administrative Law Section's Rulemaking Committee—testified that "[t]here is no better tool than cross-examination to expose unsupportable factual assertions and assuring the public that only the best science underlies agency action." *APA at 65: Is Reform Needed To Create Jobs, Promote Economic Growth and Reduce Costs?: Hearing*

### III. IN DEFENSE OF FORMAL RULEMAKING

Although luminaries of the past endorsed the prudent use of formal procedures, and while civil procedure scholars lament the decline of trials, most modern administrative law scholars have given formal rulemaking little thought and even less praise, especially given horror stories like the peanut butter rule. This dearth of scholarship would be surprising in any context, but it is particularly startling in this context because the litany of sins ascribed to formal rulemaking begs to be questioned, at least as a blanket condemnation in all circumstances.

The usual arguments against formal rulemaking are as follows: Formal rulemaking (1) does not produce better policy; (2) creates delay; (3) reduces political oversight; (4) makes it difficult to eliminate outdated rules; (5) perverts the regulatory process by encouraging agencies to make policy through means other than rulemaking; and (6) should be within the discretion of the agency. Lurking behind all of these arguments, moreover, is a deep suspicion that calls for a return to formal rulemaking are really attacks on substantive regulation dressed up in procedural garb.

Each argument is questionable, at least as an across-the-board proposition. Indeed, with the exception of the suggestion that cross-examination is ineffective, each criticism could be addressed by carefully drafted legislation. Moreover, these criticisms are largely targeted at formal rulemaking's costs, but give short-shrift to its benefits. When both the costs and benefits are considered, there is good reason to think that the criticisms leveled against formal rulemaking should sometimes be rethought.

#### A. Formal Rulemaking Can Be Effective

The most fundamental charge against formal rulemaking is that it does not work—that requiring more formality does not create better policy. This charge is the most fundamental because if correct, no amount of congressional tinkering would make formal rulemaking worthwhile. This claim, however, is

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*Before the Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 27, 38 (2011) [hereinafter Rosen Testimony] (statement of Jeffrey A. Rosen). Peter Strauss, however, responded that formal rulemaking can delay the regulatory process, invoking the peanut butter rule. Strauss Testimony, *supra* note 86, at 50. In another hearing, Sidney Shapiro testified that “[a]lmost no serious administrative law expert regards formal rulemaking as reasonable, and it has been all but relegated to the dustbin of history.” *Regulatory Accountability Act of 2011: Hearing Before the H. Comm. on the Judiciary*, 112th Cong. 102 (2011) [hereinafter Shapiro Testimony] (statement of Sidney A. Shapiro). It should be noted that this Article’s author, while in practice, assisted Rosen and Warren prepare for their hearings. This assistance was not on behalf of a client. Other hearings have also been held. See, e.g., *Regulatory Accountability Act of 2013: Hearing Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. (2013), available at [http://judiciary.house.gov/hearings/113th/hear\\_07092013.html](http://judiciary.house.gov/hearings/113th/hear_07092013.html).

questionable. In any event, it is not so obviously right that experimentation is not in order.

There are two strands of this “formal rulemaking doesn’t work” argument. First, that cross-examination is ineffective, particularly for “legislative” facts. And second, that even if cross-examination is effective in some contexts, it is ill-suited for the agency context. Both should be reexamined. Leaving aside cross-examination, moreover, formal rulemaking’s other features can also help improve the content of regulation.

### 1. *Cross-examination Is Useful, Even for Legislative Facts*

#### a. *Cross-examination Helps Uncover Truth*

One of formal rulemaking’s key virtues is cross-examination. In informal rulemaking, the agency makes scientific claims, and the most a party can do to respond is file a comment. This is disconcerting. In civil litigation, there are often competing expert written reports, but there also is an opportunity to orally question the other side’s experts—indeed, that is why *Daubert* motions are usually filed after depositions.<sup>160</sup> Not so when you are dealing with an agency. Experienced lawyers claim, however, that cross-examination is essential.<sup>161</sup> Accordingly, at least as a *prima facie* matter, one would think that cross-examination could at least sometimes help produce better rules.

That is why it is interesting that some question whether “the purported benefits of face-to-face cross-examination” are real.<sup>162</sup> In a culture so committed to cross-examination, such skepticism is refreshing—an article advocating greater use of formal rulemaking has no standing to reproach a counterintuitive position! But although the empirical evidence is mixed,<sup>163</sup> there are reasons to think cross-examination can sometimes help find truth.

For one thing, unless the evidence for doing so is compelling, society should not lightly cast aside a truth-searching mechanism as venerable as cross-

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<sup>160</sup> See, e.g., Allen Kezsbom, *Current Issues in Discovery in Environmental Litigation*, in 1 AM. LAW INST.-AM. BAR ASS’N COMM. ON CONTINUING PROF’L EDUC., ENVIRONMENTAL LITIGATION 263 (2003), available at Westlaw SH093 ALI-ABA 215 (discussing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)) (“If a party wishes to make a *Daubert* challenge a critical opportunity to create support for that motion is at the expert’s deposition.”) (footnote omitted).

<sup>161</sup> See Rosen Testimony, *supra* note 159, at 38; Warren Testimony, *supra* note 47, at 34.

<sup>162</sup> Stephenson Testimony, *supra* note 159, at 194.

<sup>163</sup> See, e.g., ROGER PARK & TOM LININGER, THE NEW WIGMORE: A TREATISE ON EVIDENCE: IMPEACHMENT AND REHABILITATION § 1.7 (2012) (noting that studies “are far from giving a definitive answer about the value of cross-examination”); Roger C. Park, *Adversarial Influences on the Interrogation of Trial Witnesses*, in ADVERSARIAL VERSUS INQUISITORIAL JUSTICE 131, 162 (Peter J. van Koppen & Steven D. Penrod eds., 2003) (“[N]o one has come close to doing a definitive study [of cross-examination], and one could argue that no one has even made a good start.”).



examination, which “is at the root of the Anglo-American adversarial system”<sup>164</sup> and is the premise of one of the Constitution’s most fundamental rights.<sup>165</sup> Cross-examination, moreover, has been embraced by countless men and women of experience. Jeremy Bentham, for instance, opined that “against erroneous or mendacious testimony, the grand security is cross-examination,”<sup>166</sup> and John Henry Wigmore trumpeted cross-examination as “beyond any doubt the greatest legal engine ever invented for the discovery of truth”<sup>167</sup>—a principle the Supreme Court has repeatedly endorsed.<sup>168</sup> Of course traditions, even venerable ones, can be wrong, but cross-examination surely enjoys the benefit of the doubt.

Tradition here, moreover, is backed by commonsense. It is hard to imagine how cross-examination could be wholly ineffective. If nothing else, it surely at least has “a healthy disciplining effect.”<sup>169</sup> The prospect that what one says will not only be questioned via paper comments but also in person—in a back-and-forth, real-time situation, with no place to hide—undoubtedly leads to greater caution before making unsupportable claims. Just like judicial review,<sup>170</sup> in other words, cross-examination is dynamic; when it works best, there is no evidence of it, because the “fear” of cross-examination has led to better testimony in the first place.<sup>171</sup> Unless critics of formal rulemaking have compelling evidence to the contrary, it is fair to believe that cross-examination can sometimes be useful.

To be sure, this claim should not be taken too far. Cross-examination is no silver bullet—it doesn’t always work. Useful exchanges of ideas, likewise, can occur without cross-examination. For example, scientists do not peer review each other’s work through cross-examination—that is, unless they are both paid

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<sup>164</sup> Jules Epstein, *The Great Engine that Couldn’t: Science, Mistaken Identifications, and the Limits of Cross-examination*, 36 STETSON L. REV. 727, 727–28 (2007) (citing, inter alia, JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* (2003)).

<sup>165</sup> See generally *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (“The [Confrontation] Clause thus reflects a judgment, not only about the desirability of reliable evidence . . . but about how reliability can best be determined.”) (discussing U.S. CONST. amend. VI).

<sup>166</sup> 5 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE SPECIALLY APPLIED TO ENGLISH PRACTICE*, n.212 (n.p., Hunt & Clarke 1827).

<sup>167</sup> 5 JOHN H. WIGMORE, *EVIDENCE* § 1367, at 29 (3d ed. 1940).

<sup>168</sup> See, e.g., *Lilly v. Virginia*, 527 U.S. 116, 124 (1999) (citing *California v. Green*, 399 U.S. 149, 158 (1970)); *White v. Illinois*, 502 U.S. 346, 356 (1992).

<sup>169</sup> Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 523 (1970).

<sup>170</sup> See, e.g., Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 529 (“[A] world without aggressive judicial review might well suffer from increases in lawlessness, carelessness, overzealous regulatory controls, and inadequate regulatory protection.”); William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 59–60 (1975) (same point).

<sup>171</sup> Stephen F. Williams, “Hybrid Rulemaking” *Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401, 438 (1975).

expert witnesses! And one of the key benefits of cross-examination is it helps with credibility determinations, i.e., to uncover whether someone is lying in a trial.<sup>172</sup> With technical fields, that characteristic may not always matter—a written exchange of ideas can often do the trick. All of this is conceded. But cross-examination surely could help the evaluation process in *some* instances, especially for decisions that are more value-laden than the agency would like to admit. Where an agency's rationale is not as clear,<sup>173</sup> moreover, having an opportunity to probe that rationale by asking questions and then follow-up questions could help.

*b. Many Facts in Rulemaking Are Not Pure "Legislative Facts"*

A more modest claim is not that cross-examination is always ineffective, but that it is unlikely to work for so-called "legislative facts."<sup>174</sup> The distinction between legislative and adjudicative facts, of course, is a common one. While "adjudicative facts" pertain to a "particular case" (e.g., who said what to whom), "legislative facts" have a more universal, less-verifiable, and greater-predictive character (e.g., punishment deters crime) and are used in "the lawmaking process."<sup>175</sup> Wielding this well-worn distinction, some argue that cross-examination would not help make better substantive rules because agencies are not investigating specific factual questions but rather are promulgating general policy standards.<sup>176</sup>

Even this more modest claim, however, can be too strong. Most obviously, not everything agencies do in rulemakings falls within legislative fact-finding. As Samuel Estreicher has explained, "whatever force [the] distinction between issues of 'legislative fact' and 'adjudicative fact' generally may enjoy, it does not justify the difference in procedural regimes; both types of issues may be present in a given rulemaking."<sup>177</sup> When an agency makes a finding—for instance, that an organism exposed to chemical X for a Y number of hours will suffer harm—that *fact* is surely apolitical in character, no less than if a court

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<sup>172</sup> But see Mark Spottswood, *Live Hearings and Paper Trials*, 38 FLA. ST. U. L. REV. 827, 829 (2011) (challenging the conventional view that "live hearings" inevitably foster "fair adjudication of disputes").

<sup>173</sup> See, e.g., *Albany Eng'g Corp. v. Fed. Energy Regulatory Comm'n*, 548 F.3d 1071, 1084 (D.C. Cir. 2008) (Brown, J., concurring in the judgment).

<sup>174</sup> See, e.g., RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 328–29 (4th ed. 2004).

<sup>175</sup> FED. R. EVID. 201(a) advisory committee's note (citing Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404–07 (1942)); see also Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 113–16 (1988) (listing examples).

<sup>176</sup> See, e.g., 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 7.2, at 419 (4th ed. 2002); Todd S. Aagaard, *Factual Premises of Statutory Interpretation in Agency Review Cases*, 77 GEO. WASH. L. REV. 366, 393–94 (2009).

<sup>177</sup> Samuel Estreicher, *Pragmatic Justice: The Contributions of Judge Harold Leventhal to Administrative Law*, 80 COLUM. L. REV. 894, 911 (1980) (footnotes omitted).

addressed the precise factual situation. Granted, in some circumstances, an agency may also engage in policymaking regarding such a chemical, for instance by invoking the precautionary principle.<sup>178</sup> But for pure findings of scientific fact—technical conclusions about how the world works—there is no reason why the distinction should dictate whether cross-examination would be useful.

Similarly, legislative facts are often so intertwined with adjudicative facts that the two cannot be separated—there is a “‘borderland’ where the principle has ‘little or no utility’” and where “it may be possible to justify any procedural result by stating the relevant issues either broadly or narrowly.”<sup>179</sup> To illustrate, consider the example Nathaniel Nathanson presented over half a century ago. He asked readers to imagine that the question before an agency “is whether a general rate increase should be allowed for the major railroads in the United States.”<sup>180</sup> In such a situation, “the factual issues concern the expenses, earnings, actual and probable tonnages, financial structures, and capital needs of all the railroads.”<sup>181</sup> As Nathanson explained, in a way “these are facts pertaining to the immediate parties, since all the railroads are parties to the proceedings and will be directly affected by the order.”<sup>182</sup> But “[i]n another sense they are general facts pertaining at least to an entire industry, and in some aspects to competing industries, to consumers and to the entire economy.”<sup>183</sup> So are these legislative or adjudicative facts? Of course they are both.

To be sure, Nathanson’s analysis was in the context of ratemaking. It does not follow, however, that other rulemakings would not also benefit from formal procedures. Ratemaking can be different from other sorts of rulemakings because of the nature of the industry (often only a few regulated parties) and the task (identifying a rate, which may be more mechanical than other regulatory decisions). But such distinctions do not categorically hold. Many rulemakings involving health and safety regulations, for instance, also involve identifiable parties and industries (e.g., airlines, chemical companies, etc.), and computing rates in ratemaking is often far from mechanical; it can involve a multitude of

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<sup>178</sup> See, e.g., Louis J. Virelli III, *Scientific Peer Review and Administrative Legitimacy*, 61 ADMIN. L. REV. 723, 741–42 (2009) (“In environmental risk assessments, for instance, administrators and commentators distinguish between questions of what risks are present (scientific questions dependent on data correlating health effects to exposure) and political inquiries into what risks are socially acceptable.”); Wagner, *supra* note 4, at 1711 (explaining that agencies should “separate science from policy”).

<sup>179</sup> Barry B. Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111, 115 (1972) (quoting 1 K. CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 7.02, at 413 (1958)).

<sup>180</sup> Nathaniel L. Nathanson, Book Review, 70 YALE L.J. 1210, 1211 (1961).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

factual and policy considerations.<sup>184</sup> One thus could easily imagine Nathanson's hypothetical being framed as service-time requirements for commercial airline pilots. The real point is that the line between legislative and adjudicative facts is often paper thin; that point is not parochially limited to ratemaking.

Judge Richard Posner has also made this point in a case involving the policy question of when to impose strict liability.<sup>185</sup> Although Posner recognized the difference between legislative and adjudicative facts, he was not absolutist. Rather, he explained that "the line should not be viewed as hard and fast. If facts critical to a decision on whether a particular activity should be subjected to a regime of strict liability cannot be determined with reasonable accuracy without an evidentiary hearing, such a hearing can and should be held" because "factual disputes of the sort ordinarily resolved by an evidentiary hearing may be germane to answering" a question of "legislative fact."<sup>186</sup> Posner's point applies equally well to formal rulemaking. The question of whether conduct is so dangerous that strict liability should be imposed is not different from what agencies decide. Indeed, that very question can be decided through notice-and-comment rulemaking.<sup>187</sup> In sum, as Professor Estreicher concluded, "adjudicatory procedures may be helpful in illuminating even decisions turning on legislative facts."<sup>188</sup> It thus is unsurprising that finding legislative facts without the benefit of adversarial safeguards is increasingly falling into disfavor in civil procedure circles.<sup>189</sup>

### c. *Cross-examination Can Benefit "Pure" Legislative Facts*

More boldly still, it is not unthinkable that cross-examination may sometimes help with even pure legislative judgments. Even if there is a

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<sup>184</sup> See, e.g., *Wash. Util. & Transp. Comm'n v. PacifiCorp*, No. UE-032065, No. 06 (Oct. 27, 2004) (explaining that "[t]he economic judgments required in rate proceedings are often hopelessly complex").

<sup>185</sup> *Ind. Belt Harbor R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1182 (7th Cir. 1990).

<sup>186</sup> *Id.* Posner did not remand for fact-finding, however, because "the plaintiff [had] not indicated any facts that it want[ed] to develop through such a hearing." *Id.*

<sup>187</sup> See, e.g., *Rights-of-Way Under the Federal Land Policy and Management Act and the Mineral Leasing Act*, 70 Fed. Reg. 20970, 21019 (Apr. 22, 2005) (deciding to adopt a strict liability standard).

<sup>188</sup> Estreicher, *supra* note 177, at 911; see also Carl A. Auerbach, *Legislative Facts in Grutter v. Bollinger*, 45 SAN DIEGO L. REV. 33, 37 (2008) (citing Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21, 38–39 (1978)) (similar point in litigation context).

<sup>189</sup> See, e.g., Frederick Schauer, *The Decline of "The Record": A Comment on Posner*, 51 DUQ. L. REV. 51, 62 (2013) (explaining that the adversarial process can counter the "common human characteristic to see one's own truths as beyond question"); Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1291–93 (2012) (addressing the "risk of systematic introduction of bias" when courts consider "legislative facts" untested by the "adversary system").

discernible line between adjudicative and legislative facts, which is not always so, why categorically conclude that cross-examination is good for “fact issues” but bad for “policy issues”? The notion that even pure legislative facts would never benefit from cross-examination is far from self-evident and in the real world is likely false—at least if actual hearing officers are to be believed.<sup>190</sup>

Glen Robinson put this point best. As he explained forty years ago, “to say categorically that general policy questions or ‘legislative facts’ cannot fruitfully be explored by testimonial procedures and cross-examination is to generalize to an extent which can only obscure analysis.”<sup>191</sup> In either sort of fact-finding, “the determination must almost invariably rest on general conclusions that are inferred from particular factual data and an evaluation of probabilities that may be as appropriate for testimonial proof and cross-examination in one case as in the other.”<sup>192</sup> In both, therefore, cross-examination can be invaluable.

In fact, as Robinson taught, sometimes cross-examination is even more important for policy judgments. Imagine, for instance, that an agency must determine which shipping method is best for the public interest:

Even if there is no dispute about specific identifiable “facts,” such as number of freight tons involved, and even if the Board’s judgment cannot be proved or disproved as easily as its finding as to the number of tons, it may still be desirable to force the Board, through cross-examination of its experts, to disclose the particular premises, including facts, opinions, and reasoning, which underlie its “policy” conclusions. Notwithstanding the absence of any contest over the one readily identifiable “fact,” cross-examination of Board witnesses could play an important role in exposing possible error, bias, or lack of solid foundation which cannot be effectively brought to light simply by introducing rebuttal argument against the generalized policy statements.<sup>193</sup>

Simply stated, since “regulators exercise vast discretion against a background of scientific uncertainty, the background assumptions they use to guide their decisionmaking are particularly influential”<sup>194</sup>—and so should be subject to cross-examination. Indeed, as Dixon admonished, it makes little sense

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<sup>190</sup> See Dixon, *supra* note 68, at 415 (advocating “driv[ing] another nail into the coffin of the legislative-adjudicative fact distinction”); Joseph Zwerdling, *A Plea for Clemency for Cross-examination*, 57 A.B.A. J. 45, 45 (1971) (defending cross-examination); see also Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 96, 102 (endorsing the “obvious value of cross-examination”).

<sup>191</sup> Robinson, *supra* note 169, at 521.

<sup>192</sup> *Id.* at 522; see also Allen, *supra* note 68, at 1159 (“I have no doubt that the prospect of cross-examination has kept some extravagances out of records.”).

<sup>193</sup> Robinson, *supra* note 169, at 522. Robinson’s hypothetical also arises in ratemaking, but that does not categorically distinguish it from other rulemakings.

<sup>194</sup> Rebecca M. Bratspies, *Human Rights and Environmental Regulation*, 19 N.Y.U. ENVTL. L.J. 225, 225 (2012).

to say that cross-examination is not useful when agency experts make “sweeping statements beyond [their] area of expertise.”<sup>195</sup>

In sum, instead of categorically declaring that legislative facts are off limits, one should take a more nuanced view. Even Kenneth Culp Davis—the originator of the distinction between legislative and adjudicative facts and no friend to formal rulemaking—warned against taking an “extreme” view: “Is not the judgment an easy one that both extremes should be pulled toward the middle position of allowing response to the facts but denying cross-examination *unless a special need for it is shown*?”<sup>196</sup> While this Article disagrees about how much discretion agencies should have, Davis’s point that cross-examination can sometimes help with “legislative” facts is important.

## 2. *The Agency Context Is Not Sufficiently Unique*

A slightly different argument is to concede that cross-examination is useful in some contexts, but to argue it is not useful in the regulatory context because of unique agency attributes. This argument also does not categorically withstand scrutiny.

Any suggestion that agencies are so technically sophisticated that cross-examination would never be helpful is dubious. Agencies, after all, are not always exemplary users of the scientific method.<sup>197</sup> For those affected by regulation, it would be invaluable to be able to show a court that the agency cannot defend itself in cross-examination. If nothing else, producing such a transcript would help overcome the fact that judges often are loath to climb the steep learning curve for scientific questions.<sup>198</sup> Because agencies “dress up each of their guesstimates about the facts . . . in enormous, multi-layered costumes of technocratic rationality,” and “[c]ourts cannot . . . be partners to technocrats in a realm in which only technocrats speak the language,”<sup>199</sup> mechanisms such as cross-examination that help illuminate agency sleight-of-hands should receive careful consideration.

Nor is it true that agencies always have greater technical sophistication than courts. Bankruptcy is a good example. A bankruptcy judge has as much technical sophistication within her sphere as many agency decision-makers have

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<sup>195</sup> Dixon, *supra* note 68, at 407.

<sup>196</sup> Kenneth Culp Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 935 (1980) (emphasis added).

<sup>197</sup> See, e.g., Wagner, *supra* note 4, at 1711.

<sup>198</sup> See, e.g., Matthew C. Stephenson, *A Costly Signaling Theory of “Hard Look” Judicial Review*, 58 ADMIN. L. REV. 753, 754 (2006) (“[Courts] are reluctant to second-guess the choices of more expert decisionmakers, especially when complex or technical issues are involved.”).

<sup>199</sup> JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 776–77 (2010) (quoting MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION 151–52 (1988); Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1507 (1983)).

within theirs.<sup>200</sup> And because bankruptcy cases are not tried to a jury, the bankruptcy judge's technical proficiency is not lost in translation. Nevertheless, bankruptcy judges can find cross-examination helpful.<sup>201</sup>

To be sure, the fact that agencies are making policy is not irrelevant. Agencies have to make "value" judgments in their decision-making—while "a court or jury finding facts in order to apply a rule of law is theoretically able to do so in a value-free way," agencies interject policy into their analysis.<sup>202</sup> As Stephen Williams has instructed, this potentially means that "the relative significance of 'accurate' factual investigation is reduced. For to the extent that the agency, simply by recasting its value judgment, may achieve its original result despite being forced to correct its factual errors, the benefits that are supposed to be derived from precision are vitiated."<sup>203</sup> True enough—agencies are different. But there still is merit in making the agency get the facts right *before* allowing it to play policymaker. The agency should not be able to escape the political consequences of its policy decision by dressing it up as a scientific conclusion.<sup>204</sup>

This discussion, however, prompts another counter-argument. If formal rulemaking were required, would agency decision-makers reflexively side with agency counsel? Professor Hamilton pointed to this tendency as a common feature of FDA rulemakings:

The formal hearing then tends to be viewed by the agency merely as a device for creating a record supporting administrative decisions previously reached. The FDA attorney at the hearing need not be particularly concerned with persuading the agency as to the correctness of the views he is espousing. He is reasonably confident that where a contradiction in views on a broad policy question occurs, the agency decision will cite the views of the witnesses he calls rather than the contradictory testimony of witnesses called by other participants, and that such testimony will probably be sufficient to uphold the finding on judicial review.<sup>205</sup>

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<sup>200</sup> Cf. Brook E. Gotberg, *Restructuring the Bankruptcy System: A Strategic Response to Stern v. Marshall*, 87 AM. BANKR. L.J. 191, 194–95 (2013) (explaining bankruptcy court specialization and how bankruptcy courts are similar to agencies); Troy A. McKenzie, *Getting to the Core of Stern v. Marshall: History, Expertise, and the Separation of Powers*, 86 AM. BANKR. L.J. 23, 30–31 (2012) (explaining bankruptcy judges' expertise).

<sup>201</sup> See, e.g., Stan Bernstein, Susan H. Seabury & Jack F. Williams, *The Empowerment of Bankruptcy Courts in Addressing Financial Expert Testimony*, 80 AM. BANKR. L.J. 377, 391–92 (2006) (explaining that bankruptcy judges "thoroughly test[] through cross-examination" expert reports). Bankruptcy, of course, largely involves adjudicative facts, but as explained above, the distinction between legislative and adjudicative facts is far from watertight.

<sup>202</sup> Williams, *supra* note 171, at 406–07.

<sup>203</sup> *Id.* at 408.

<sup>204</sup> See, e.g., Wagner, *supra* note 4, at 1711.

<sup>205</sup> Hamilton I, *supra* note 23, at 1291.

Such an argument, while not without force, is not dispositive. For one thing, as Hamilton acknowledged, the FDA's approach was not true at all agencies. It was inaccurate, for instance, in the Department of Agriculture.<sup>206</sup> Similarly, not all agency mistakes are equal. If cross-examination can show that an agency is *really* wrong, having someone point that out would hopefully lead the agency to reconsider. Even Hamilton acknowledged that this point "cannot be completely rejected."<sup>207</sup>

In any event, even if agencies conducting formal rulemakings are not always open to persuasion, it would not cut that strongly against formal rulemaking. If an agency's mind is closed, having a transcript of cross-examination demonstrating such closed-mindedness can only help with judicial review.<sup>208</sup> Hamilton responded by conceding that while it is "true that rulemaking on a record does provide a record similar to a record in adjudication and permits judicial review of the factual findings on the basis of a substantial evidence test," such sharpened judicial review is "unlikely" to be "a very meaningful check against agency action," particularly because most "rulemaking procedures involve broad economic or policy questions rather than particularized factual issues."<sup>209</sup>

Perhaps. But what's the stopping point? If agencies promulgate rules using suspect science—and they do, at least sometimes<sup>210</sup>—should courts simply defer? And if the answer to that question is no, and if cross-examination can make judicial review more effective, *even at the margins*, then cross-examination may be worthwhile. Accuracy in rulemakings is a serious issue. The fact that agencies sometimes get things wrong is why Congress enacted the Information Quality Act<sup>211</sup> and the White House Office of Management and Budget (OMB) issued the Peer Review Bulletin.<sup>212</sup> Greater use of formal rulemaking—with targeted cross-examination—would build on those efforts. Whether cross-examination is cost justified is distinct from whether it ever works in the first place.

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<sup>206</sup> See *id.* at 1302.

<sup>207</sup> *Id.* at 1293.

<sup>208</sup> See, e.g., Warren Testimony, *supra* note 47, at 40; cf. Zwerdling, *supra* note 190, at 57.

<sup>209</sup> Hamilton I, *supra* note 23, at 1292.

<sup>210</sup> See, e.g., Wagner, *supra* note 4, at 1617 ("[A]gencies exaggerate the contributions made by science in setting toxic standards in order to avoid accountability for the underlying policy decisions.").

<sup>211</sup> 44 U.S.C. § 3516 (2012).

<sup>212</sup> Memorandum on Final Information Quality Bulletin for Peer Review from the Dir. of the OMB to the Heads of Departments and Agencies (Dec. 16, 2004), *available at* <http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-03.pdf>.



### 3. Formal Rulemaking's Characteristics Other than Cross-examination Are Also Valuable

Formal rulemaking, of course, is more than just cross-examination. It also involves burdens, trial management, and, perhaps most important, a closed record. These too can help produce better, more technically sound rules than what results from informal rulemaking.

In evaluating formal rulemaking's potential to help create better rules, it is important to compare it to its primary rival, informal rulemaking. Informal rulemaking is far from perfect, even with White House assistance through the Office of Information and Regulatory Affairs (OIRA).<sup>213</sup> As explained above, informal rulemaking does not have the benefit of cross-examination. But a lack of cross-examination is not the only problem. As Mark Seidenfeld has explained, the fact is that sometimes notice-and-comment rulemaking is rigged: "the thrust of some rules, if not the details, are preordained. This is especially true when an agency institutes a rulemaking proceeding to satisfy demands for a particular outcome from the White House or political appointees at the top of the agency."<sup>214</sup> While an agency in informal rulemaking "must issue an explanation for any rule that is ultimately adopted . . . it can effectively cherry-pick from the potentially vast materials provided during the rulemaking to construct an account of its reasoning process."<sup>215</sup> Looking at these flaws, Hamilton recognized that one "adversely affected in some serious way by a proposed rule may find little solace in the opportunity to submit a written comment."<sup>216</sup> Making matters worse, agencies sometimes cloud their decisions with technical jargon.<sup>217</sup> This is a serious problem because rulemaking does not work well when policy disputes are "disguised as issues of scientific judgment."<sup>218</sup>

Formal rulemaking could be a potent antidote to such pathologies. Under formal rulemaking, there is a live hearing. If the rule is not justified based on evidence presented there, it cannot stand.<sup>219</sup> Nor can the agency brush aside a party's proposed findings—it must respond.<sup>220</sup> And hearing participants giving

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<sup>213</sup> OIRA often reviews regulations before they are promulgated. For a general discussion of OIRA, see generally Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013). OIRA, however, while important, is often not an ideal gatekeeper. See, e.g., Warren Testimony, *supra* note 47, at 33–34 (listing problems with OIRA, including understaffing, lack of adversarial procedures, and exclusion from judicial review); Nou, *supra* note 136, at 1756 (explaining that "agencies . . . insulate their decisions from presidential review").

<sup>214</sup> Seidenfeld, *supra* note 3, at 514–15.

<sup>215</sup> Lawson, *supra* note 116, at 3.

<sup>216</sup> Hamilton I, *supra* note 23, at 1314.

<sup>217</sup> See Wagner, *supra* note 4, at 1676 n.230.

<sup>218</sup> *Id.* at 1676–77.

<sup>219</sup> See 5 U.S.C. §§ 556(e), 557(c) (2012).

<sup>220</sup> See *id.* § 557(c).

testimony can use plain language, making it harder for the agency to muddy the waters. Even leaving aside cross-examination, these aspects of formal rulemaking likely could make the content of rules better. And while, to be sure, an agency could sometimes attempt to use a predisposed hearing officer (thus, in a sense, rigging the game too), many hearing officers often are devoted to playing it straight.<sup>221</sup> In any event, as explained below, even if a hearing officer is biased in favor of the agency, a judicial challenge to the agency's decision could be benefited if there is a transcript of what occurred. A closed record is no small thing.

Indeed, it is formal rulemaking's total package that makes it so valuable. This is why formal rulemaking often could be better than hybrid rulemaking. No doubt many of formal rulemaking's benefits can be obtained through strict forms of hybrid rulemaking like the Magnuson-Moss Warranty Act (applied by the Federal Trade Commission), which requires most but not all of what formal rulemaking does, but omitting some features such as a closed-hearing requirement.<sup>222</sup> But even the most formal forms of hybrid rulemaking—and many examples of hybrid rulemaking are not especially formal<sup>223</sup>—may not always be enough. Cross-examination is valuable because it can make rulemaking more accurate, but a closed record—with a bar on *ex parte* communications—is also valuable because it increases transparency. Similarly, unlike formal rulemaking, hybrid rulemaking is often agency specific; there is no overarching program, and so there is reduced cross-fertilization of case-management ideas across agencies. Although hybrid rulemaking can be better than nothing, it may not always be a complete substitute for the full force of formal rulemaking.

### B. *The Costs of Formal Rulemaking Need Not Be Excessive*

The most common argument against formal rulemaking is not that it cannot work in theory, but rather that it fails in practice. In particular, many say that formal procedures make rulemaking take too long, which leads to rules being promulgated in a weaker form or sometimes not at all. This was Hamilton's chief condemnation,<sup>224</sup> and similar observations have been made many times since. It thus has been argued that the "common criticism of notice-and-comment rulemaking is that it is *too demanding* of agencies," and "the only thing the formal rulemaking process is likely to add is red tape."<sup>225</sup> The "ossification" argument is obviously important, particularly because formal

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<sup>221</sup> See, e.g., Dixon, *supra* note 68, at 400, 423, 426–27.

<sup>222</sup> See *id.* at 392 (detailing the act).

<sup>223</sup> See *id.* at 392 n.13.

<sup>224</sup> See Hamilton I, *supra* note 23, at 1312–13 ("[T]he primary impact of these procedural requirements . . . has often been the dilution of the regulatory process . . ."); see also Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1481 (1992) (same point).

<sup>225</sup> Stephenson Testimony, *supra* note 159, at 193.

rulemaking *can* delay rulemaking. Nevertheless, this concern should not be given undue weight.

### 1. *Ossification May Be Overstated*

To begin with, before concluding that requiring more formal rulemaking will make ossification worse, one must understand just how bad ossification is. Ossification refers to the idea that “it takes a long time and an extensive commitment of agency resources to use the notice and comment process to issue a rule.”<sup>226</sup> The literature on ossification, of course, is elephantine, with the thrust being that ossification is a serious problem warranting reform to make informal rulemaking easier.<sup>227</sup>

Evidence, however, suggests that ossification may not be as pervasive as some fear. In particular, Jason and Susan Webb Yackee have empirically studied the “ossification hypothesis,” concluding that “evidence that ossification is either a serious or widespread problem is mixed and relatively weak. Even in the allegedly ossified era, federal agencies remain able to propose and promulgate historically large numbers of regulations, and to do so relatively quickly.”<sup>228</sup> While not claiming that “specific bureaucratic initiatives are never unduly delayed, or that socially worthwhile regulations are always promulgated,”<sup>229</sup> this study urges scholars not to “make general claims about the ossified state of everyday federal administrative practice risk” because “ossification may not be a particularly helpful or accurate way of describing the state of modern rulemaking in general. The experience of the average rule may be very different from the experience of the highly atypical, ossified rule.”<sup>230</sup> In short, “[t]he ossification thesis has long been accepted as a matter of faith,” but it may not reflect the real world.<sup>231</sup> Others have reached similar conclusions.<sup>232</sup> That ossification may be surmountable is unsurprising—agencies are not only criticized for delay, but also for promulgating “midnight regulations” before a new administration.<sup>233</sup> Even Richard Pierce—a champion of the ossification

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<sup>226</sup> Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to “Testing the Ossification Hypothesis,”* 80 GEO. WASH. L. REV. 1493, 1493 (2012).

<sup>227</sup> Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60–62 (1995); see also Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1386–87 (1992).

<sup>228</sup> Webb Yackee & Webb Yackee, *supra* note 68, at 1421–22.

<sup>229</sup> *Id.* at 1422 (emphasis omitted).

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 1436.

<sup>232</sup> See, e.g., William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability To Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 393–97 (2000); Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251, 251–58 (2009).

<sup>233</sup> Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 601 (2003).

hypothesis—acknowledges that “[o]ssification is a problem only in the context of . . . rulemakings that raise controversial issues where the stakes are high.”<sup>234</sup>

It also is important to realize that not all regulatory delay is attributable to procedure. Delay, for instance, often results from conflict about whether the rule makes political sense.<sup>235</sup> When there is conflict within the agency itself, delay may be inevitable, no matter the procedural regime.<sup>236</sup> It is quite unfair to take everything bad about rulemaking and pin it on procedure. A statute may be intrinsically hard to implement; the D.C. Circuit may be tough to satisfy; and the political process may be tricky to navigate. The result can be that regardless of whether the rulemaking process is formal or informal, it may take a long time to promulgate rules.<sup>237</sup> As William Dixon has forcefully explained, we should not include “cost factors for which cross-examination is in no way responsible and then blam[e] cross-examination for the whole thing.”<sup>238</sup>

But what about the peanut butter fiasco? Even assuming the worst about that rulemaking, putting too much weight on it is nothing more than argument by anecdote—one could just as well point to informal rulemakings that have taken even longer, with more complex records.<sup>239</sup> To be sure, if informal rulemaking takes a long time, then logically one would think that adding more procedure would make the process take even longer (although formal rulemaking could sometimes make the process shorter if, for instance, the threat of cross-examination prevents weak arguments from being advanced in the first place). But the real point is this: whether formal rulemaking is a good idea cannot be determined by looking at a handful of rules, especially not from decades ago.<sup>240</sup> Agencies are criticized for “draconian responses to sensationalist anecdotes.”<sup>241</sup> Congress should not fall victim to the same fallacy.

If one is going to evaluate procedure based on anecdote, however, one could point to recent examples of formal rulemaking where the process did not take long at all. Although *Florida East Coast Railway* significantly reduced the number of statutes subject to formal rulemaking, some statutes still use the magic words. Under these statutes, there are examples of formal rulemakings that address complex questions without becoming bogged down. For example,

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<sup>234</sup> Pierce, *supra* note 226, at 1498.

<sup>235</sup> See, e.g., Seidenfeld, *supra* note 232, at 317–20.

<sup>236</sup> See, e.g., Dixon, *supra* note 68, at 420 (explaining that an agency’s workings are often “to blame and not its use of trial-type procedures”).

<sup>237</sup> See *id.* at 419.

<sup>238</sup> *Id.* at 435.

<sup>239</sup> See, e.g., Webb Yackee & Webb Yackee, *supra* note 68, at 1422 (listing examples).

<sup>240</sup> Stephen Williams, for instance, authored a significant article in 1975 that reviewed a “limited sampling” of rulemakings and questioned cross-examination. See Williams, *supra* note 171, at 436–37. While insightful, this “sampling” is hardly comprehensive, and does not answer whether formal rulemaking would make sense today.

<sup>241</sup> Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 4 (1995).

the Marine Mammal Protection Act requires formal rulemaking,<sup>242</sup> and the process can move quickly, as shown by a recent Seventh Circuit decision.<sup>243</sup> This is true for other statutes as well like the AMAA, which can also move fast.<sup>244</sup>

In fact, even Professor Hamilton concluded that not all formal rulemakings are cumbersome. As he explained, “even fairly complex” rulemakings in the Agriculture Department moved expeditiously:

An FDA attorney, after learning that formal evidentiary hearings were held by Agriculture as virtually the first stage of the rulemaking process, commented that he wondered how they ever finished a proceeding. Actually, the Agriculture hearings are not unduly protracted . . . .

Unlike observers of the FDA hearings, persons familiar with the AMS formal rulemaking hearing see little reason to eliminate it. The consensus is that while the hearings have problems, the advantages outweigh the disadvantages, and less formal proceedings might create new problems.<sup>245</sup>

The AMAA is not less complex than other statutes. To the contrary, few regulatory juggling acts are as complicated as milk regulation.<sup>246</sup> Nevertheless, even on Hamilton’s telling, formal rulemaking can work.<sup>247</sup>

## 2. Agencies Have Tools To Prevent Abusive Tactics

Even assuming, reasonably, moreover, that regulated parties would sometimes attempt to use formal rulemaking to delay rules, agencies can protect the integrity of their own proceedings. A good hearing officer, like a good trial judge, has many tools at her disposal to move a hearing along.

The fear that a party may “string out” a proceeding is not limited to agencies. Courts deal with it all the time. Judges, however, have devised

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<sup>242</sup> JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 59 n.41 (4th ed. 2006); see also MICHAEL L. GOSLINER, MARINE MAMMAL COMM’N, LEGAL CONSIDERATIONS UNDER FEDERAL LAWS APPLICABLE TO THE MANAGEMENT OF MONK SEALS ON THE MAIN HAWAIIAN ISLANDS 4–5 (2002), available at <http://www.mmc.gov/reports/workshop/pdf/gosliner.pdf>.

<sup>243</sup> See *White Eagle Coop. Ass’n v. Conner*, 553 F.3d 467, 472–73, 477, 481–83, 485–87 (7th Cir. 2009) (upholding a formal rulemaking that took less than a year).

<sup>244</sup> See *Hettinga v. United States*, 560 F.3d 498, 501 (D.C. Cir. 2009) (explaining that a formal rulemaking was completed in approximately a year).

<sup>245</sup> Hamilton I, *supra* note 23, at 1299.

<sup>246</sup> *Id.* at 1294 (noting that milk regulation is “extremely complex”); see also *Alto Dairy v. Veneman*, 336 F.3d 560, 563–65 (7th Cir. 2003) (explaining the complexities involved in “redistribut[ing] wealth from consumers to producers of milk”).

<sup>247</sup> To be sure, Hamilton focused on unique AMAA aspects—for instance, that the facts are “narrow and detailed” and not “within the knowledge of a commodity marketing specialist located in Washington, D.C.” Hamilton I, *supra* note 23, at 1299–1300.

mechanisms to expeditiously process cases.<sup>248</sup> For instance, “a significant number of judges and trial lawyers favor the ‘chess clock’ approach to trials, in which the court gives each side a fixed amount of time to present its case after consultation with both parties.”<sup>249</sup> By contrast, some “judges advocate an approach under which excessive time spent on cross examination or objecting results in a time bonus allocated to the other side, or where limits are defined contextually, such as ‘cross cannot exceed direct.’”<sup>250</sup> And courts can (1) “streamline trials by limiting discovery, the number of issues to be addressed, the number of witnesses presented and the manner in which evidence is presented at trial”; (2) require the parties to “present uncontested evidence in the form of stipulations or pre-approved narrative statements read by counsel”; (3) “permit summaries of voluminous evidence”;<sup>251</sup> and (4) sanction parties that abuse the trial process.<sup>252</sup>

There is no reason agencies could not do the same.<sup>253</sup> In formal rulemaking, a hearing officer has power to “exclude ‘irrelevant, immaterial, or unduly repetitious evidence.’”<sup>254</sup> Commenting on this broad authority, Gary Lawson has explained that

many of the costs associated with formal rulemaking, such as the costs generated by oral presentations and cross-examination by multiple parties, can be controlled by the presiding official, because the APA permits the agency to limit such party participation in rulemakings when it can do so without prejudice to anyone’s interests.<sup>255</sup>

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<sup>248</sup> See, e.g., MANUAL FOR COMPLEX LITIGATION § 10.1 (4th ed. 2004) (explaining how judges can “bring[] about a just resolution as speedily, inexpensively, and fairly as possible”); Patrick E. Longan, *The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials*, 35 ARIZ. L. REV. 663, 664–68 (1993) (explaining how judges can speed up trials).

<sup>249</sup> PRINCIPLES FOR JURIES AND JURY TRIALS 12 cmt. at 88 (2005), available at <http://aja.ncsc.dni.us/conferences/2010Annual/SpeakerMaterials/44%20-%20Mize%20ABA%20jury%20principles.pdf>.

<sup>250</sup> *Id.* at 88–89 (citation omitted).

<sup>251</sup> *Id.* at 89.

<sup>252</sup> See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 56–57 (1991).

<sup>253</sup> See, e.g., Dixon, *supra* note 68, at 400 (explaining in the context of a hybrid rulemaking statute that hearing officers can limit the time spent on cross-examination, with favorable results); Heinzerling, *supra* note 57, at 1018 (explaining “mechanisms like summary judgment”). It could be argued, of course, that hearing officers have insufficient incentives to speed up hearings, and that the wrong individuals are selected for the job. If true, targeted reform may be appropriate—but it hardly seems commensurate to reject formal rulemaking altogether.

<sup>254</sup> VANESSA K. BURROWS & TODD GARVEY, CONG. RESEARCH SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 3 (2011) (citing 5 U.S.C. §§ 556(c)–(d) (2012)).

<sup>255</sup> Lawson, *supra* note 116, at 4.

A hearing officer with a firm hand can make all the difference; for instance, the Federal Maritime Commission completed two hearings “in a matter of days” through effective trial management.<sup>256</sup>

The peanut butter rulemaking again is a good example. If the testimony there was duplicative and irrelevant, the hearing officer should have put a stop to it. The parties would then have had to show they were prejudiced. This system has proven itself in civil litigation, which is not full of “freewheeling, uncontrolled cross-examination creating skyrocketing costs”—the same could and should be true of agencies.<sup>257</sup> Dixon, a hearing officer, put it best: “wherever you have counsel abusing [a hearing,] you have a judge or [hearing] officer who is not doing his job.”<sup>258</sup>

A related problem is there can be many parties involved in a rulemaking, making it difficult to administer a hearing in a workable way.<sup>259</sup> Indeed, this may very well be formal rulemaking’s most serious weakness. It is easy to envision hoards of regulated parties and public interest groups submitting proposed findings of fact and law, wanting to offer evidence, taking a turn at cross-examination, filing objections to perceived procedure failings, and so on. What a nightmare!

But again, this problem is not unique to agencies—civil litigation also generates cases with numerous parties with divergent interests (think multi-district litigation). Stephen Williams, surveying the scene, accordingly dismissed this too-many-parties argument as “inadequate on its face” because “an agency can . . . permit a suitable champion to represent the entire group (or each of several conflicting interest groups).”<sup>260</sup> Williams’s assessment may be too hasty; we ought not be sanguine that it would always be easy to find a “champion,” or that those who do not get to play will happily sit on the sidelines as someone else conducts cross-examination. Such problems often bedevil complex litigation.<sup>261</sup> Nevertheless, although the problem is real, federal courts somehow manage well enough, and there may be ways to do it better.<sup>262</sup> Lessons learned from many years of applying Federal Rule of Civil Procedure 23 and managing multi-district litigation could be brought to bear. In other words, this problem, while weighty, is precisely the sort that could benefit from experimentation.<sup>263</sup>

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<sup>256</sup> Hamilton I, *supra* note 23, at 1311 (citations omitted).

<sup>257</sup> Dixon, *supra* note 68, at 412.

<sup>258</sup> *Id.* at 426.

<sup>259</sup> See, e.g., Hamilton II, *supra* note 68, at 1148–50.

<sup>260</sup> Williams, *supra* note 171, at 404.

<sup>261</sup> See, e.g., D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1184–90 (2013).

<sup>262</sup> See *id.* at 1235–56 (discussing ways to better manage complex litigation).

<sup>263</sup> See Listokin, *supra* note 148, at 553 (urging greater procedural experimentation with focus on formal rulemaking).

### 3. Congress Can Prudently Effectuate Formal Rulemaking

Congress, moreover, can do much to avoid ossification. Most obviously, if formal rulemaking is a priority, Congress can shift resources to effectuate it. The federal fisc is finite, but targeted expenditures should be considered. Congress, moreover, could expand the APA's "good cause" exception<sup>264</sup> and allow agencies to avoid formal rulemaking if they can demonstrate compelling reasons. Similarly, an "escape valve" could be created if formal rulemaking has been improperly delayed. These are just examples of the sorts of options available to Congress.

Legislation also could be drafted to limit when formal rulemaking is required. Although this would not limit costs of formal rulemaking for particular rules, it could minimize aggregate delay. Formal rulemaking, for example, could be reserved for rules involving complex scientific, economic, or other similar determinations. In such rulemakings, the agency already should separate its technical conclusions from its policy prescriptions.<sup>265</sup> And for such rulemakings, even if "pure" legislative facts should not be subject to cross-examination—a proposition this Article disputes—threshold technical questions could be subject to cross-examination without unduly intruding into the agency's policymaking.

Alternatively, Congress could create cost triggers for formal rulemaking. This is the approach taken in the RAA, which would require formal rulemaking for rules costing more than a billion dollars.<sup>266</sup> Whether that is an appropriate dollar figure is beyond the scope of this Article, but the concept is consistent with the commonsense notion that for more important rules, more procedure is appropriate.<sup>267</sup> A cost trigger could be a good way to implement formal rulemaking because the payoff from getting major rules right is so spectacularly large that some delay could easily be worth it. A cost trigger, moreover, is also more easily administered. On the other hand, Congress might require formal rulemaking for especially "complex" rules.<sup>268</sup> As Yair Listokin reminds us, experimentation is important.<sup>269</sup>

### 4. We Must Balance All the Costs and Benefits

At the end of the day, however, even if formal rulemaking would lead to delay, that would not answer whether it is a good idea. Sometimes delay is

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<sup>264</sup> 5 U.S.C. § 553(b)(3)(B) (2012).

<sup>265</sup> See, e.g., Virelli, *supra* note 178, at 740–41.

<sup>266</sup> Regulatory Accountability Act of 2011, H.R. 3010, 112th Cong. § 2 (2011).

<sup>267</sup> Cf. ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 93-4, IMPROVING THE ENVIRONMENT FOR AGENCY RULEMAKING 2 (1993) ("We therefore recommend that presidential oversight and review be reserved for the most important rules . . .").

<sup>268</sup> ACUS 76-3, *supra* note 95, at 2–3.

<sup>269</sup> See Listokin, *supra* note 148, at 553.



justified.<sup>270</sup> The real question is this: assuming that formal rulemaking causes delay,<sup>271</sup> are the costs imposed by that delay offset by the benefits of formal rulemaking? One has to look at both sides of the ledger. Delay itself, moreover, can have underappreciated benefits. .

Like most things in life, formal rulemaking involves trade-offs. If more procedures are added to rulemaking, all else being equal, the rulemaking process will usually take longer. Just how much longer is debatable, and—for reasons explained above—it is possible that delay would not be that long for many rulemakings. The concession that some delay may result, however, does not mean that formal rulemaking should be scrapped in all circumstances. Whether formal procedures are worth it “requires us to address not just whether rulemaking takes longer, but whether the detriments of delay or inaction outweigh improvements to the substance of the rules themselves.”<sup>272</sup> We often trade time for increased accuracy and other values. “[T]here is,” after all, “an inherent tension between getting things done right, and getting things done quickly.”<sup>273</sup>

Civil litigation, for instance, is not quick. Cases can take years, and efforts to shorten the process are bemoaned as inconsistent with “our civil justice system.”<sup>274</sup> Civil litigation and administration law, however, often overlap. The same experts can provide data for regulations and civil trials. And both systems can be afflicted with less-than-perfect science. Nevertheless, while cross-examination is a backbone of civil litigation, it has effectively been banished from agencies. To a “martian” looking at the situation from afar, this state of affairs surely would be strange.<sup>275</sup>

This comparison between administrative law and civil litigation, of course, should not be taken too far. The two systems are not interchangeable. Indeed, as Henry Friendly noted, it is a mistake to make agencies “work like courts”—there ought not be a “wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts.”<sup>276</sup> But just because there are differences, even important ones, does not mean there is no room for cross-fertilization. For instance, it is fair to compare rulemaking to civil litigation at least in the narrow sense that in both there are experts who

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<sup>270</sup> See Lynn E. Blais & Wendy E. Wagner, *Emerging Science, Adaptive Regulation, and the Problem of Rulemaking Ruts*, 86 TEX. L. REV. 1701, 1709–10 (2008) (noting, but not adopting, the argument that “even if ossification is occurring,” it may be “a small price to pay for . . . democratic safeguards”).

<sup>271</sup> Formal rulemaking, of course, could also cut time in some circumstances. After all, some “witnesses [may be] dissuaded from [participating] by the knowledge that they would face cross-examination.” Allen, *supra* note 68, at 1159.

<sup>272</sup> Webb Yackee & Webb Yackee, *supra* note 68, at 1467.

<sup>273</sup> *Id.* at 1466.

<sup>274</sup> Miller, *supra* note 16, at 287.

<sup>275</sup> Cf. Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles,”* 78 VA. L. REV. 1769, 1770 (1992).

<sup>276</sup> Friendly II, *supra* note 12, at 899–900 (internal citations omitted).

make claims that may not be entirely correct, and society needs mechanisms to uncover error.<sup>277</sup> Cross-examination, which has proven itself in the context of civil litigation, may also be usefully employed in the agency context. Although there are obvious, non-trivial differences between courts and agencies, the overlapping portions of these two systems may support formal rulemaking in certain circumstances, even if some rulemakings take longer. This point is particularly true for very costly regulations.

At bottom, as Lawson notes, “[i]f the goal is to produce as many rules as fast as possible, informal rulemaking is the superior option,” but if we want *better* rules—rules of higher technical quality, and ones that command greater public respect—then formal rulemaking may sometimes have a place.<sup>278</sup> Indeed, as Listokin explains, “[w]hile the recordkeeping requirements of formal rulemaking undoubtedly add to costs, such costs again appear small relative to the potential impacts of policy.”<sup>279</sup> None of this is to deny that delay can be a serious problem.<sup>280</sup> Nevertheless, especially if carefully managed, there is reason to think that formal rulemaking’s costs sometimes can be more than offset by its benefits.

### *C. Formal Rulemaking Can Increase Political Legitimacy*

This discussion of delay, however, prompts another point—would formal rulemaking make rulemaking less legitimate? Arguments against formal rulemaking on legitimacy grounds include that formal procedures delay regulatory change, thereby “frustrat[ing] oversight committees who want the agency to do something quickly about a pressing problem”; providing “agencies a convenient way to ‘run out the clock’ when they do not in fact want to do what Congress or the President want them to do”; and empowering “agency lawyers who know how to navigate the labyrinthine procedures” at the expense of “political appointees and senior policy staff.”<sup>281</sup> Each of these arguments is well-put and important.

Nonetheless, none should carry the day in all instances. Congress always has a tool available if an agency is taking too long—the power to enact legislation. Agencies also can “run out the clock” with informal rulemaking. And in today’s world of hard-look review, agency lawyers are already key players in rulemaking; even without formal rulemaking, that isn’t going to change.

Equally important, these arguments do not place sufficient weight on the other side of the cost–benefit scale. Formal rulemaking can increase the legitimacy of agency action by enhancing the public’s trust in the process.

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<sup>277</sup> See Lawson, *supra* note 116, at 4 (making just such a comparison).

<sup>278</sup> *Id.*

<sup>279</sup> Listokin, *supra* note 148, at 533.

<sup>280</sup> See Shapiro Testimony, *supra* note 159, at 92–94.

<sup>281</sup> Stephenson Testimony, *supra* note 159, at 201.

Congress likewise can (at least somewhat) minimize whatever legitimacy problems formal rulemaking may create.

### 1. *Trial-Like Procedures Enhance Public Trust*

One of the most important benefits of formal rulemaking is that it can make agency action more legitimate. The public, as a rule, respects trials. Indeed, it is a common lament of civil procedure scholars that trials are becoming rare.<sup>282</sup> The chief reason for this lamentation, of course, is the concern that accuracy is being sacrificed on the altar of efficiency—that civil procedure has seen “a steady march toward ‘efficient’ disposition by sacrificing the merits to avoid trial.”<sup>283</sup> For reasons given above, formal rulemaking, used wisely, can improve the substantive content of rules.

But there are other values connected with trials—including the very “credibility”<sup>284</sup> and “legitimacy” of the process itself.<sup>285</sup> Going back to the Magna Carta,

[the] right to be heard, the core of due process of law, has been integral to democratic thought and institutions . . . . Public trials ensure that each of us has the opportunity to see that the laws our representatives have chosen to replace the state of nature are more than empty promises (or threats)—that the community can and will enforce them.<sup>286</sup>

Scholars consequently have recognized that “while trials clearly are intended to serve instrumental values as devices for determining the ‘truth’ . . . they also serve other, interrelated values, including participatory, dignitary, educational, and legitimating values.”<sup>287</sup> In sum, as Richard Levy and Sidney Shapiro have observed, a trial “serves as a check on improper government action and ensures its legality.”<sup>288</sup>

The same legitimacy principle holds true in administrative law—with particular bite. As Friendly recognized nearly forty years ago, “[d]istrust of the bureaucracy is surely one reason for the clamor for adversary proceedings in the

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<sup>282</sup> See, e.g., Edward H. Cooper, *King Arthur Confronts Twlqy Pleading*, 90 OR. L. REV. 955, 956–57 (2012); Miller, *supra* note 16, at 358–59; see also Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 401 (2011).

<sup>283</sup> Cooper, *supra* note 282, at 957.

<sup>284</sup> Miller, *supra* note 16, at 307.

<sup>285</sup> David E. Steinberg, *Simplifying the Choice of Forum: A Response to Professor Clermont and Professor Eisenberg*, 75 WASH. U. L.Q. 1479, 1508 (1997).

<sup>286</sup> Burbank & Subrin, *supra* note 282, at 401.

<sup>287</sup> Levy & Shapiro, *supra* note 136, at 504. To be sure, Levy and Shapiro do not endorse formal rulemaking—far from it. But just because they have a different prescription for how to cure administrative law does not mean we disagree the patient is sick.

<sup>288</sup> *Id.*

United States.”<sup>289</sup> There is little reason to think that administrative law’s public relations problem has improved in the intervening decades. Instead of dismissing congressional efforts to incorporate trial-like procedures into rulemaking, administrative law scholars should see those efforts as dying canaries in the coal mine. Agencies cannot promulgate rules without the public’s confidence.<sup>290</sup> To be sure, many ordinary citizens have no idea what agencies are up to, so whether they use trials or not may be a non-issue. But that point, although sometimes true, proves too much; it suggests that legitimacy never matters.

Although many of formal rulemaking’s foes may be loath to admit it, the fact is that many (though surely not all) Americans “deeply” believe “that anyone affected by government decisions should have the opportunity to present his case . . . in a way that forces the agency to consider the argument.”<sup>291</sup> Even those who feel that formal procedures are ineffective must acknowledge that others subscribe to the idea that one “who regulates ought to appear publicly if there is a challenge, and put on the table, subject to cross-examination, the facts on which he grounds his proposal.”<sup>292</sup> While litigation and rulemaking are different, it is hard for many to shake the nagging feeling that the whole point of a “procedural system” is “to reach the right result after an adversarial contest.”<sup>293</sup> As Arthur Miller has observed, this belief is “American in spirit—like apple pie, baseball, and the flag.”<sup>294</sup>

Administrative law often falls short of the “apple pie” standard, which “may contribute to the unease with which Americans view the administrative state.”<sup>295</sup> Levy and Shapiro are correct that in a perfect world, citizens would be able to trust agencies “without sacrificing the efficiency of the administrative process.”<sup>296</sup> But that world does not always exist. Many do not believe “that notice and comment procedures . . . provide sufficient protection against agency error or abuse.”<sup>297</sup>

Formal rulemaking has a unique capacity to address that widespread distrust because while “Americans may not trust the trial completely,” they still “trust it more than the administrative process.”<sup>298</sup> In fact, Hamilton offered an important insight on this point. Specifically, he found that although “Congress has

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<sup>289</sup> Friendly I, *supra* note 10, at 1279–80.

<sup>290</sup> See, e.g., Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 9 (2009) (“[W]hen legitimate authorities issue unpopular decisions, those decisions generate less friction and fewer debilitating consequences.”).

<sup>291</sup> Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 19 (1982).

<sup>292</sup> H. Thomas Austern, *Food Standards: The Balance Between Certainty and Innovation*, 24 FOOD DRUG COSM. L.J. 440, 451 (1969).

<sup>293</sup> Miller, *supra* note 16, at 290.

<sup>294</sup> *Id.*

<sup>295</sup> Levy & Shapiro, *supra* note 136, at 474.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 488.

<sup>298</sup> *Id.* at 505.

imposed mandatory trial-type hearings” in a wide array of statutes, it is not a “random” pattern: “all involve the heavy hand of the bureaucrat coming down on individual entrepreneurs in a supposedly free enterprise economy.”<sup>299</sup> Although this Article envisions a more robust role for formal rulemaking, it is unsurprising that formal rulemaking repeatedly has been used in situations involving small businesses.<sup>300</sup> Congress may believe that agency legitimacy is particularly significant in those instances.

Finally, from a legitimacy perspective, there also is much to be said for transparency<sup>301</sup>—one of formal rulemaking’s foremost attributes. For instance, formal rulemaking bans *ex parte* contacts.<sup>302</sup> Such bans, to be sure, are not always democratic because they make it harder for elected officials to stop an agency from promulgating a rule that does not command majority support (although not all such influence is majoritarian).<sup>303</sup> But a transparent process is not trivial; indeed, transparency is often a prerequisite for legitimacy.<sup>304</sup> Hamilton, for instance, observed the “town meeting or participatory democracy flavor” of formal rulemaking in the context of the AMAA.<sup>305</sup> Because “rugged individualist[s] . . . do[] not want a bureaucrat telling [them] what to grow,” the public discourse created by a transparent process serves an important legitimizing function.<sup>306</sup> The same, of course, is true for other aspects of formal rulemaking, including the requirement that the agency directly respond to proposed findings of fact and conclusions of law.<sup>307</sup> In the face of such filings, the agency must be transparent—the APA requires the agency to respond based on the record generated at the public hearing.<sup>308</sup> And at the same time, this transparency means that court can better review what the agency has done.

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<sup>299</sup> Hamilton I, *supra* note 23, at 1311–12.

<sup>300</sup> *See id.* at 1312.

<sup>301</sup> *See, e.g.,* Lisa Grow Sun & Ronnell Andersen Jones, *Disaggregating Disasters*, 60 UCLA L. REV. 884, 890, 897 (2013) (explaining how transparency can “reinforce government legitimacy”). Transparency, of course, should not always be celebrated. Much of society could not work in complete openness. *See* David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 302–03 (2010). But formal rulemaking may strike a good balance. An agency is free to decide whether to push a rule and how to do it, just as with informal rulemaking; the difference is the agency must be able to defend its decision in a public process and can only rely on evidence obtained through that process.

<sup>302</sup> 5 U.S.C. § 557(d) (2012).

<sup>303</sup> *See* Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 55 (2008) (“[A]n elected politician . . . will almost always deviate from the majority in one direction or the other.”).

<sup>304</sup> *See, e.g.,* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1787 (2007) (“*Ex parte* communications in informal proceedings are problematic . . . because they deprive outsiders of access to information about agency action.”); Note, *supra* note 52, at 194.

<sup>305</sup> Hamilton I, *supra* note 23, at 1300.

<sup>306</sup> *Id.*

<sup>307</sup> 5 U.S.C. § 557(c).

<sup>308</sup> *Id.*; *see also* 5 U.S.C. § 556(e).

These transparency-reinforcing outcomes also can increase the legitimacy of administrative law, at least in some cases.

At bottom, Americans may sometimes have reasons to be suspicious of informal rulemaking. Informal rulemaking can be rigged and public comments shrugged off.<sup>309</sup> Citizens and courts, moreover, are discouraged from full engagement by the agency's technical jargon,<sup>310</sup> which the agency is not forced to translate into something a lay public and bench can understand.<sup>311</sup> Emily Hammond Meazell has emphasized that a legitimate process should "reinforce administrative-law values like participation, transparency, and deliberation."<sup>312</sup> Formal rulemaking can do that; informal rulemaking, sometimes not so much. The result is that even on the doubtful assumption that formal rulemaking would not make at least some rules substantively better, the fact that the public would have greater confidence in the process because of its formality may be reason enough alone to mandate the use of formal rulemaking, at least sometimes.

## 2. *Controversial Rules Perhaps Should Take Longer*

More broadly, the fact that formal rulemaking would sometimes make the regulatory process take longer itself may have pro-democracy benefits. As Richard Pierce notes, the only rules that are beset with "ossification" are "significant" ones.<sup>313</sup> But is delay for rules of that sort always a vice? Shouldn't rules that "raise controversial issues"<sup>314</sup> take more time so the public has more time to decide whether it approves? If rules that could not command majority support could be rushed through the regulatory process, that would pose profound legitimacy problems.<sup>315</sup> Accordingly, to say that "ossification is a real and serious problem measured with reference to any plausible normative baseline" can go too far—democratic legitimacy is certainly a "plausible normative baseline."<sup>316</sup>

Although the author cannot fully develop the point that delay itself can be democracy enhancing in this Article (a point which can be taken too far), the

<sup>309</sup> See *supra* Part III.A.3.

<sup>310</sup> See, e.g., Wagner, *supra* note 4, at 1676.

<sup>311</sup> Cf. Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1735, 1742 (2011) (noting that courts try to "translat[e]" an agency's "scientific, technical, and policy considerations").

<sup>312</sup> Meazell, *supra* note 113, at 735.

<sup>313</sup> Pierce, *supra* note 226, at 1498.

<sup>314</sup> *Id.*

<sup>315</sup> See, e.g., Seidenfeld, *supra* note 232, at 320.

<sup>316</sup> Pierce, *supra* note 226, at 1503. To be sure, Pierce's statement reflects the fact that Congress often commands rulemakings to occur in timeframes which cannot be met. But Congress might enact legislation at a high level of abstraction, leaving tough policy issues for the agency to sort out. See, e.g., Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 56–57 (1982). In that context, a resulting rule may not reflect the popular will in any meaningful sense.

fact is that presidential elections are every four years. There is a compelling normative claim that a president should not be able to promulgate high-stake regulations without the voters having a chance to express themselves at the ballot box, especially when presidents turn to agencies for victories Congress will not give them.<sup>317</sup> One could go even further and say—given that innumerable policies are at stake in a presidential election, and not every policy supported by the victor commands majority support—that for very high-value rules, there should be a change in administration *before* they go into effect. If the issues in a proposed major rule are so important that delay is utterly intolerable, then Congress could and should enact a statute. Speed is not the only value.<sup>318</sup>

In the legislative process, things often take a long time. Important statutes can require multiple presidential terms before being enacted, if they ever are. The process leading to the APA itself took over a decade.<sup>319</sup> Although delay is frustrating to those who want immediate action, the process cannot be short circuited if it is to retain its legitimacy. The same can be true for administrative law. If the rulemaking process takes longer for controversial rules because of formal rulemaking, that is par for the course—controversial measures take longer.

### 3. Congress Has Options To Enhance Legitimacy

Finally, as with delay, Congress can experiment with ways to minimize any accountability problems created by formal rulemaking. The APA has served the nation well for over sixty years, but it is not etched in stone—thoughtful experimentation should be the order of the day.

First, if an agency is taking too long to promulgate a rule, Congress can bypass the agency altogether. “Frustrated”<sup>320</sup> members of oversight committees can enact a statute. Agencies provide expertise to “assist” lawmaking,<sup>321</sup> but administrative action should be a supplement to congressional action, not a replacement for it.

Second, if one is concerned that formal rulemaking deprives the public of the opportunity to participate in the regulatory process (for instance, because an interested person could not attend a hearing), there is no reason why Congress could not incorporate aspects of notice-and-comment rulemaking into a formal rulemaking approach. This is something the Congress has attempted to do in the RAA.<sup>322</sup> Although adding more procedures would create more costs, for particularly expensive rules, where the payoff of getting them right is the

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<sup>317</sup> See, e.g., Kagan, *supra* note 2, at 2248.

<sup>318</sup> See John F. Manning, *Lawmaking Made Easy*, 10 GREEN BAG 2D 191, 202 (2007) (challenging whether “easy” lawmaking is always something to celebrate).

<sup>319</sup> See, e.g., Shepherd, *supra* note 27, at 1560.

<sup>320</sup> Stephenson Testimony, *supra* note 159, at 201.

<sup>321</sup> *Bowen v. Am. Hosp. Ass’n*, 476 U.S. 610, 627 (1986) (plurality opinion).

<sup>322</sup> See *supra* Part II.C.

greatest and public confidence is most essential, additional procedures may be worth it.

#### *D. Defective Rules Can Still Be Rescinded*

Another important argument against formal rulemaking is that it makes it too hard to purge bad rules because whatever “procedural requirements that make it difficult or impossible to promulgate rules that impose new mandates on the private sector also make it difficult or impossible to promulgate rules that lift such mandates.”<sup>323</sup> Put another way, Congress should tread warily before making it harder to create rules on the front-end because administrative law’s symmetry requirement means that the same procedures will make it more difficult to eliminate rules on the backend.

This “symmetry argument” depends on at least two assumptions. First, that the costs of new rules are comparable to old rules. And second, that there *should* be symmetry in administrative law—that the same procedures to promulgate rules should be followed to rescind them. Both assumptions are suspect, at least as blanket propositions.

##### *1. Some Rules Impose Most of Their Costs Upfront*

The first problem with this symmetry argument is it makes an assumption about the nature of regulation—that the costs of “defective” old rules (i.e., rules which should be eliminated) are comparable to the costs of “defective” new rules (i.e., rules which never should be promulgated at all). This assumption matters because if the costs of defective new rules outweigh the costs of defective old rules, then society would prefer a procedure that makes it harder to promulgate defective new rules. Indeed, it is only if the costs of defective old rules equal or exceed the costs of defective new rules that society should elect the alternative.

So the question is this: which rules are more costly? The answer, of course, is it depends. Some rules create one-time costs, such as orders to modify technological processes. For such rules, it does not matter how easy rescission is; once the one-time costs are spent, they are spent, so rescission is irrelevant.<sup>324</sup> For these rules, no reasonable person would sacrifice the ability to prevent defective new rules in exchange for an easier process to remove defective old ones. Other rules, of course, impose ongoing burdens, i.e., rules that increase the marginal costs of production. For that category, it may make sense to be able to eliminate defective rules quickly.

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<sup>323</sup> Stephenson Testimony, *supra* note 159, at 197.

<sup>324</sup> See Cass R. Sunstein, *Irreversible and Catastrophic*, 91 CORNELL L. REV. 841, 863 (2006) (“Sunk costs are a familiar feature of environmental regulation, in the form of mandates that require technological change.”).



To say that formal rulemaking should not be required for new rules because the same procedure would apply for rescission is thus incomplete, especially for rules that create sunk costs. Old defective rules have already worked their evil; it is only new rules that society has to worry about.

## 2. *There Is No Need for Universal Symmetry*

Second, and more fundamental, why must there always be symmetry in administrative law? If Congress were to require agencies to use formal rulemaking when promulgating certain rules, there is no reason why formal rulemaking would have to be used to rescind the rules so promulgated. In other words, the symmetry argument suffers from a failure of imagination. If society is better off if it is easier to eliminate rules already on the books than to promulgate new ones, then symmetry should fall by the wayside. Symmetry has charm, but must not be overvalued.

The question of whether symmetry should always be required is a broad one, the full scope of which easily merits an article of its own. But the general point is simple enough. The idea behind symmetry is intuitively appealing. Because, as the Supreme Court has held, “the forces of change do not always or necessarily point in the direction of deregulation,” “there is no more reason to presume that changing circumstances require the rescission of prior action, instead of a revision in or even the extension of current regulation.”<sup>325</sup> The underlying principle driving this intuition, however, should not be that symmetry is valuable in its own right, but rather that agencies should not be able to eliminate rules in an arbitrary manner.

The broader idea that symmetry is itself valuable, regardless of whether the agency is acting arbitrarily, stretches a good thing too far. While there must be a reasoned process to promulgate rules, and a reasoned process to eliminate them, there is no logical reason why precisely the same reasoned process is needed for both. In the context of formal rulemaking, for instance, why not require certain rules to be promulgated using formal rulemaking, but still allow rules to be rescinded via informal rulemaking? Such a system would incorporate the benefits of cross-examination before any regulatory costs are created, but would allow wasteful costs that are already occurring to be more readily remedied. Those who argue against formal rulemaking do not suggest that informal rulemaking is arbitrary—instead, it is their preferred method for *all* rulemakings.

So long as the manner of rescinding rules is not arbitrary, there is a good reason to question symmetry. After all, new ideas often do not work, at least not without a great deal of trial and error.<sup>326</sup> This problem is especially acute in the

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<sup>325</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983).

<sup>326</sup> Aaron L. Nielson, Commentary, *Reflections on the End of the Federal Law Clerk Hiring Plan*, 112 MICH. L. REV. FIRST IMPRESSIONS 22, 27–28 (2013), <http://www.michiganlawreview.org/assets/fi/112/Nielson.pdf>.

realm of policy because “[u]nlike a [computer] operating system, there is often not an opportunity to test a policy until after the game is already being played for keeps.”<sup>327</sup> Given just how hard it is to design a new policy that works, and how easy it is for unintended consequences to crop up, it makes sense that sometimes it should be easier to rescind an old rule than to make a new one. To be sure, not all regulatory choices are binary, but the general principle is sufficiently clear.

Congress, moreover, has already crossed this bridge. It does not always require the same procedures for changing a rule as it does for creating one in the first instance. In the AMAA, rules must be promulgated through formal rulemaking, but the agency is free in some instances to modify rules without a formal hearing, including by relaxing supply restrictions.<sup>328</sup> The same asymmetry could be applied more generally.

### E. Regulatory “Perversion” Is Not Inevitable

One of the most powerful arguments against formal rulemaking is that it perverts the regulatory process. In particular, if it “costs” too much for agencies to use rulemaking, they will be tempted to find less “expensive” substitutes like adjudication or guidance documents,<sup>329</sup> which may not be socially ideal. It is not surprising that agencies would do this—they even avoid presidential oversight.<sup>330</sup> The danger therefore is that agencies “might abandon both formal and notice-and-comment rulemaking in favor of less overt mechanisms for making policy.”<sup>331</sup>

This “regulatory perversion” argument, of course, is not without irony. A common lament is that regulators cannot outflank regulated parties, as every prohibition simply leads the regulated party to try something new to achieve the same end.<sup>332</sup> Many therefore call for dynamic regulation: “a strong regulatory system should have in place people who are constantly monitoring that system’s effectiveness and asking questions about what regulators could and should be doing differently,” always remembering “this is a Sisyphean task that can never fully succeed.”<sup>333</sup>

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<sup>327</sup> *Id.* at 28. See generally EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 143–44 (Frank M. Turner ed., Yale Univ. Press 2003) (1790).

<sup>328</sup> Hamilton I, *supra* note 23, at 1294 & n.94.

<sup>329</sup> See generally SEC v. Chenery Corp., 332 U.S. 194, 202–03 (1947) (holding that agencies can create policy through rulemaking or adjudication).

<sup>330</sup> See generally Nou, *supra* note 136, at 1756.

<sup>331</sup> Samaha, *supra* note 68, at 610; see also Hamilton I, *supra* note 23, at 1289.

<sup>332</sup> See, e.g., Jeffrey Manns, *Insuring Against a Derivative Disaster: The Case for Decentralized Risk Management*, 98 IOWA L. REV. 1575, 1584 (2013) (“Regulators are always playing catch-up . . .”); see also Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1705 (1999) (same principle).

<sup>333</sup> Brett McDonnell, *Don’t Panic! Defending Cowardly Interventions During and After a Financial Crisis*, 116 PENN ST. L. REV. 1, 47 (2011).

Here, it is regulators who would be trying to evade restrictions. When regulated parties violate the spirit of the law, regulators do not throw up their hands and say regulation is hopeless; the same attitude could and should be brought to bear against regulators themselves. The answer is to “cut off” an agency’s ability to evade the procedures Congress believes they should follow, not give up on the idea of procedural reform altogether.

Should Congress require greater use of formal rulemaking, it will also have to use its oversight powers to monitor how agencies respond. Similarly, Congress should also consider measures to preclude agencies from evading those formal procedures. Just what those measures should be merits discussion, but the fact that agencies may be tempted to sidestep congressional reform efforts hardly seems insurmountable. Nor is the problem of evading restrictions on agency discretion limited to the formal rulemaking context; it arises in other contexts too.<sup>334</sup> How to deal with that problem is the sort of issue that would benefit from experimentation and vigilance—not preemptive surrender.

#### *F. Agencies Should Not Always Have Discretion*

The next argument that opponents of formal rulemaking offer is that whether to employ heightened procedures should be within the agency’s discretion. *Florida East Coast Railway* only holds that agencies generally are not required to use formal rulemaking; it does not forbid formal rulemaking. Because an agency—in its discretion—can use heightened procedures if appropriate, why not just trust the agency?

This argument, alas, gives agencies too much credit. Regulators do many things well, but, like all of us, they have blind spots. Scholars have noted “characteristic pathologies of modern regulation—myopia, interest group pressure, draconian responses to sensationalist anecdotes, poor priority setting, and simple confusion.”<sup>335</sup> Agencies also hate losing<sup>336</sup>; formal rulemaking may make that distasteful outcome more likely.<sup>337</sup> And regulators may have a distinct normative vision of what rulemaking ought to be—a system “in which reasonable people reason together toward the proper solution of common problems,” not something “dirty” like a trial.<sup>338</sup> Given these pathologies, why think that agencies will ever voluntarily use formal rulemaking?

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<sup>334</sup> See, e.g., Nina A. Mendelson & Jonathan B. Wiener, *Evaluating Responses to Agency Evasion of OIRA*, 37 HARV. J.L. & PUB. POL’Y (forthcoming 2014).

<sup>335</sup> Rosen Testimony, *supra* note 159, at 36 (quoting Pildes & Sunstein, *supra* note 241, at 4).

<sup>336</sup> See Nou, *supra* note 136, at 1756.

<sup>337</sup> See, e.g., Dixon, *supra* note 68, at 438.

<sup>338</sup> *Id.* at 440. It should be noted that distaste for adversarial processes helped lead to negotiated rulemaking. Whether negotiated rulemaking has achieved this goal, however, is doubtful. See Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111, 1131–36. Adversarial procedures are unpleasant, but perhaps effective.

A key benefit of formal rulemaking is it subjects agency assumptions to greater scrutiny. Almost by definition, an agency will never conclude that formal rulemaking is required because the agency thinks it is right. Nor does it require any great imagination to see that those within an agency would not give much weight to legitimacy concerns—after all, how could *anyone* think that the team across the hallway is illegitimate?<sup>339</sup> Instead, government officials are often more “concern[ed] with the efficiency of the process than with the fairness of the procedure.”<sup>340</sup>

Needless to say, there are many instances where discretion has been curtailed. This pattern has been carried over into the regulatory context. In fact, containing overflowing agency discretion was one of the key reasons why the APA was enacted in the first place. As the Supreme Court explained shortly after the APA’s enactment, the statute was necessary because “power was not sufficiently safeguarded and sometimes was put to arbitrary and biased use.”<sup>341</sup> Congress required more safeguards because agencies *abuse* their discretion. To say that agencies should decide when those very safeguards should be employed turns the APA on its head.

Both the ABA Section and the Administrative Conference of the United States, moreover, have acknowledged that formal rulemaking can be useful under certain conditions, for instance when the rulemaking is especially complex or economically significant.<sup>342</sup> But neither followed through and urged that agencies be required to use formal rulemaking when those conditions are met. While requiring greater use of formal rulemaking would be overinclusive in some cases, a bright-line rule still could make sense. Because formal rulemaking can be effective—after all, Professor Hamilton is correct that the “problem with . . . trial-type procedures is that they sometimes work poorly, not that they always work poorly”<sup>343</sup>—the question is whether agencies voluntarily use formal rulemaking where it is appropriate. But that’s not a question at all; agencies effectively never use formal rulemaking. Indeed, the agency in today’s post-*Florida East Coast Railway* world that would voluntarily “choose formal over informal processes” would be “the administrative equivalent of the dodo—exotic, ungainly, of a different era.”<sup>344</sup> Leaving the choice to agencies results in nothing. The burden thus may fall on Congress to create a bright-line rule.

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<sup>339</sup> See, e.g., Hamilton I, *supra* note 23, at 1314 (“[A]gency personnel . . . believe that the agency will be careful, fair, and thorough, and object to more formal procedures as unnecessary.”).

<sup>340</sup> Dixon, *supra* note 68, at 403. Dixon offered this critique regarding the Administrative Conference, which he believed issues recommendations biased in favor of the government’s institutional interests. See *id.* at 402–03.

<sup>341</sup> *Wong Yang Sung v. McGrath*, 339 U.S. 33, 37 (1950).

<sup>342</sup> See ABA SECTION COMMENTS, *supra* note 14, at 21; ACUS 76-3, *supra* note 95, at 2–3.

<sup>343</sup> Hamilton I, *supra* note 23, at 1335.

<sup>344</sup> Heinzerling, *supra* note 57, at 1014.

### G. Formal Rulemaking Is Not a Sham

Finally, perhaps the highest hurdle to a careful review of the merits of formal rulemaking is the pervasive belief that arguments advanced in its favor are disingenuous, and that the whole point of formal rulemaking is to hobble agencies because it is “cheaper to pay a lawyer for cross-examining at a hearing than it is to comply with a proposed rule.”<sup>345</sup> After all, don’t the obvious costs of formal rulemaking suggest that the real target of reform is not the *process* by which regulations are promulgated, but rather the *substance* of the regulations themselves?<sup>346</sup> And if proposals for formal rulemaking are pretextual, why consider their merits?

This reasoning, of course, proves too much—as Justice Harlan reminds us, “every procedural variation is ‘outcome-determinative.’”<sup>347</sup> Undoubtedly some push for (or against) formal rulemaking for reasons that have nothing to do with procedural concerns. But that is true for all procedural reform. A business might push to reform class actions not because it is worried about the due process rights of absent class members, but because it simply does not want to be on the hook for large amounts of money. Does that mean that we should not care about the due process rights of absent class members? To ask is to answer.

Indeed, the fierce fight over whether to enact the APA itself was not purely a high-minded discussion about procedure: “a central purpose of the proponents of administrative reform was to constrain liberal New Deal agencies, especially the National Labor Relations Board and Securities and Exchange Commission.”<sup>348</sup> Does that mean that the APA itself should not have been enacted?<sup>349</sup> The reality is that procedural reform has almost always been greeted with howls that the real purpose is delay.<sup>350</sup>

Nor is it true that formal rulemaking is inherently anti-regulation. Justice Douglas, former Chair of the Securities and Exchange Commission, dissented in *Florida East Coast Railway*. Judge Friendly stressed that formal procedures can be problematic, but recognized they sometimes can be valuable. One can advocate for more procedures in good faith.

<sup>345</sup> Hamilton I, *supra* note 23, at 1288; see also PIERCE, *supra* note 65, § 7.2 (“Every experienced lobbyist knows that . . . Congress uses the term [‘on the record’] only when it does not want an agency to be able to issue rules . . .”).

<sup>346</sup> Cf. Stephenson Testimony, *supra* note 159, at 198 (warning against “disguis[ing] substantive decisions as procedural decisions”).

<sup>347</sup> *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

<sup>348</sup> *Shepherd*, *supra* note 27, at 1560.

<sup>349</sup> See Cary Coglianese, *The Rhetoric and Reality of Regulatory Reform*, 25 YALE J. ON REG. 85, 90 (2008) (“[A]t the time of the APA’s adoption some academic observers forecasted ‘disastrous’ effects from the law, characterizing the Act as nothing short of a ‘sabotage of the administrative process.’” (quoting Frederick F. Blachly & Miriam E. Oatman, *Sabotage of the Administrative Process*, 6 PUB. ADMIN. REV. 213, 213 (1946))).

<sup>350</sup> *Id.* at 86–90 (collecting examples of rhetorical indignation following procedural reform).

At bottom, this Article calls for better rules, not fewer rules. It takes no position on the ongoing and contested overregulation debate,<sup>351</sup> because that debate is not material to the arguments here. To say that rules can be more accurate and that formal procedures can increase the public's confidence in the process is not to say that there are too many regulations. Indeed, within reason, there is an argument that when an agency engages in formal rulemaking, a reviewing court should hesitate before second-guessing the result. After all, with the benefit of cross-examination and a closed record, a court may have less reason to worry that an agency has gone astray.<sup>352</sup> Formal rulemaking thus could sometimes *facilitate* regulation, not hinder it.<sup>353</sup>

In fact, it is possible that formal rulemaking could make judicial review *both* more meaningful for regulated parties *and* less demanding of agencies. Informal rulemaking arguably has become so cumbersome because courts want to police agencies but lack substantive expertise. Faced with that reality, courts have generated myriad requirements for informal rulemaking to serve as proxies for substantive review. These proxies, unfortunately, may work poorly. Formal rulemaking might work better.

#### IV. NOW MAY BE THE TIME TO REEXAMINE FORMAL RULEMAKING

Finally, not only is formal rulemaking a good idea, it may be an idea whose time has come. Today, the impact of a handful of major rules is significant—billions of dollars each year.<sup>354</sup> These rules, moreover, often depend on complicated technical judgments, complete with assumptions and, yes, perhaps biases. And the public trust upon which legitimacy depends is sometimes lacking.

In the years since *Florida East Coast Railway*, much has changed about administrative law in ways that make formal rulemaking more appropriate. Agencies are promulgating more high-cost rules now than in the past.<sup>355</sup> Moreover, the regulatory process is not always ideal; as Chief Justice Roberts has recently suggested, agencies can sidestep statutes and “‘strong-arm[] . . . regulated parties.’”<sup>356</sup> In this new world, it seems reasonable that before an agency promulgates an especially complex rule costing hundreds of

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<sup>351</sup> See, e.g., Shapiro Testimony, *supra* note 159, at 86 (collecting authorities and discussing NICOLE V. CRAIN & MARK W. CRAIN, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS (2010), available at <http://www.sba.gov/advo/research/rs371tot.pdf>) (arguing overregulation claims are mistaken and addressing a study done for the Small Business Administration suggesting the annual costs of federal regulations is approximately \$1.75 trillion dollars).

<sup>352</sup> Cf. Stephenson, *supra* note 198 (arguing that courts are more likely to defer where agencies signal that the issues are important and properly handled).

<sup>353</sup> See, e.g., Warren Testimony, *supra* note 47, at 38.

<sup>354</sup> See, e.g., WHITE HOUSE 2013 REPORT, *supra* note 19, at 3–4.

<sup>355</sup> See *id.*

<sup>356</sup> See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878–80 (2013) (Roberts, C.J., dissenting).

millions or even billions of dollars, its decision-making should sometimes be subject to formal procedures. Many administrative law scholars of the past recognized the power of formal procedures to profitably channel agency action. That insight may apply with even greater force today. While this Article does not address the contested hypothesis that there is too much regulation, it does contend that the quality of rules and public respect for the rulemaking process could potentially be improved through prudent use of formal procedures.

Humility, however, is in order. Even though formal rulemaking's costs do not appear to outweigh its benefits, at least not categorically, care should be taken. Regulatory reforms, like regulations themselves, can have unintended consequences. In employing a new idea, one should proceed warily, attentive to what may go wrong. Prudence requires that "[w]e compensate, we reconcile, we balance."<sup>357</sup> Because so few formal rulemakings have taken place since *Florida East Coast Railway*, we should proceed carefully. A broad revision of the APA based on limited data is unwise; a piecemeal approach is better. For formal rulemaking to be worthwhile, its potential benefits would have to outweigh its conceded costs. The best way to know for certain which way the cost-benefit scales tilt is careful analysis, not a rush to judgment.

This Article therefore does not propose any definite prescription for reforming the rulemaking process, much less does it endorse any proposed legislation. Instead, it calls for a renewed discussion. The conventional wisdom today that formal rulemaking can serve no useful function is under-reasoned and much too unqualified; it certainly has not been proved. This Article is dubious that the legislative/adjudicative fact distinction can always carry the weight put upon it; that formal procedures could never be carefully managed by a good hearing officer; and that a formal process would not sometimes boost the public's confidence. This Article thus tentatively believes that formal rulemaking may sometimes serve useful functions; looking at all the evidence, it appears that there is a good case in favor of sometimes requiring formal rulemaking, especially for those rules that are particularly costly, complex, or controversial.<sup>358</sup> But that tentative belief may be wrong! The opinions expressed in this Article should be seen as jumping off points for more thinking and analysis, an opportunity to restart a dialogue from years gone by.

For example, the dearth of evidence on cross-examination cries out for experimentation. It simply is not good enough to say there is no systematic evidence that cross-examination is effective. When billions of dollars in costs are on the table, there is no excuse for wondering about such things. Richard Pierce also wisely notes that "[s]omeone needs to engage in a systematic empirical study of the average total amount of time and resources required for an agency to issue an economically significant rule through use of the notice and comment procedure."<sup>359</sup> He's right.

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<sup>357</sup> BURKE, *supra* note 327, at 143–44.

<sup>358</sup> ACUS 76-3, *supra* note 95, at 2–3.

<sup>359</sup> Pierce, *supra* note 226, at 1498.

What exactly formal rulemaking should look like also merits investigation. For instance, in a complicated rulemaking involving difficult scientific questions, how many agency experts should have to testify, and could they rely on peer-reviewed work from those outside the agency? Within the agency, there could be dozens or even hundreds of employees working on the rule. The answer, at an abstract level, does not seem complicated—the agency, which has the burden of proof, should put on enough experts to sustain its burden, and if it relies on outside research, it should be required to defend that reliance. This pattern seems to operate pretty well in complex litigation. But whether in actual application this pattern would work in the agency context is something that requires experience. Many ideas look better on a blackboard than in real life.

Going forward, the political branches should also move cautiously, with an eye towards experimentation. Congress, for instance, could consider “trial runs” of formal rulemaking. Under such an experiment, Congress could order that half of the proposed rules from select agencies worth more than a certain sum or of a certain type be randomly assigned to a formal rulemaking track, while the others remain in the informal rulemaking track. Such a proposal would be open to gamesmanship, but it would at least create something concrete to examine. Rather than relying on anecdotes and speculation, empirical analysis is essential. There simply are not enough formal rulemakings conducted today to say whether they work in practice; the universe of rulemakings requiring formal procedures should be expanded. At the end of the day, it may prove that formal rulemaking isn’t worth the trouble, or that hybrid rulemaking achieves all the benefits of formal rulemaking but with fewer costs, or that OIRA review works well enough. The only way to know for sure, however, is to experiment.

## V. CONCLUSION

Formal rulemaking is not without downsides—as its many critics are quick to point out. It can make rulemaking take longer, is subject to abuse, and may not create better substance policy each time it is applied. Focusing on these costs led the Supreme Court in *Florida East Coast Railway* to effectively write formal rulemaking out of the U.S. Code. But formal rulemaking has powerful benefits too, including the potential to uproot an agency’s faulty assumptions and increase the public’s confidence in the regulatory process. Weighing both the costs and benefits, formal rulemaking at least deserves another look. When exactly to use formal rulemaking is a difficult question, but it is a question that must be answered with clear-eyed analysis of the situation today, not moldy anecdotes about peanut butter. Formal rulemaking has spent a generation in exile. The moment may have come to consider whether formal rulemaking might yet play a limited but key role in the future of administrative law.